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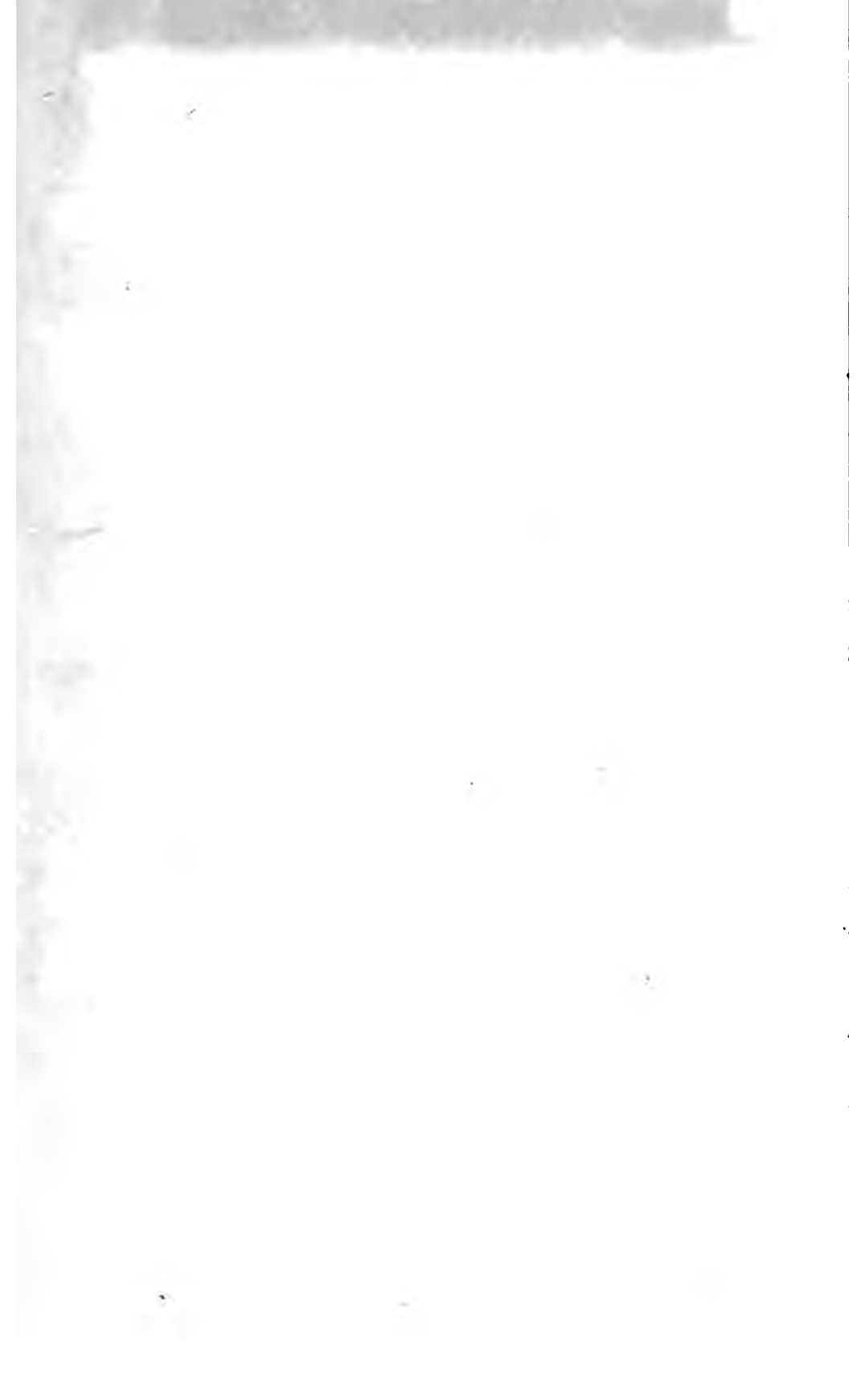
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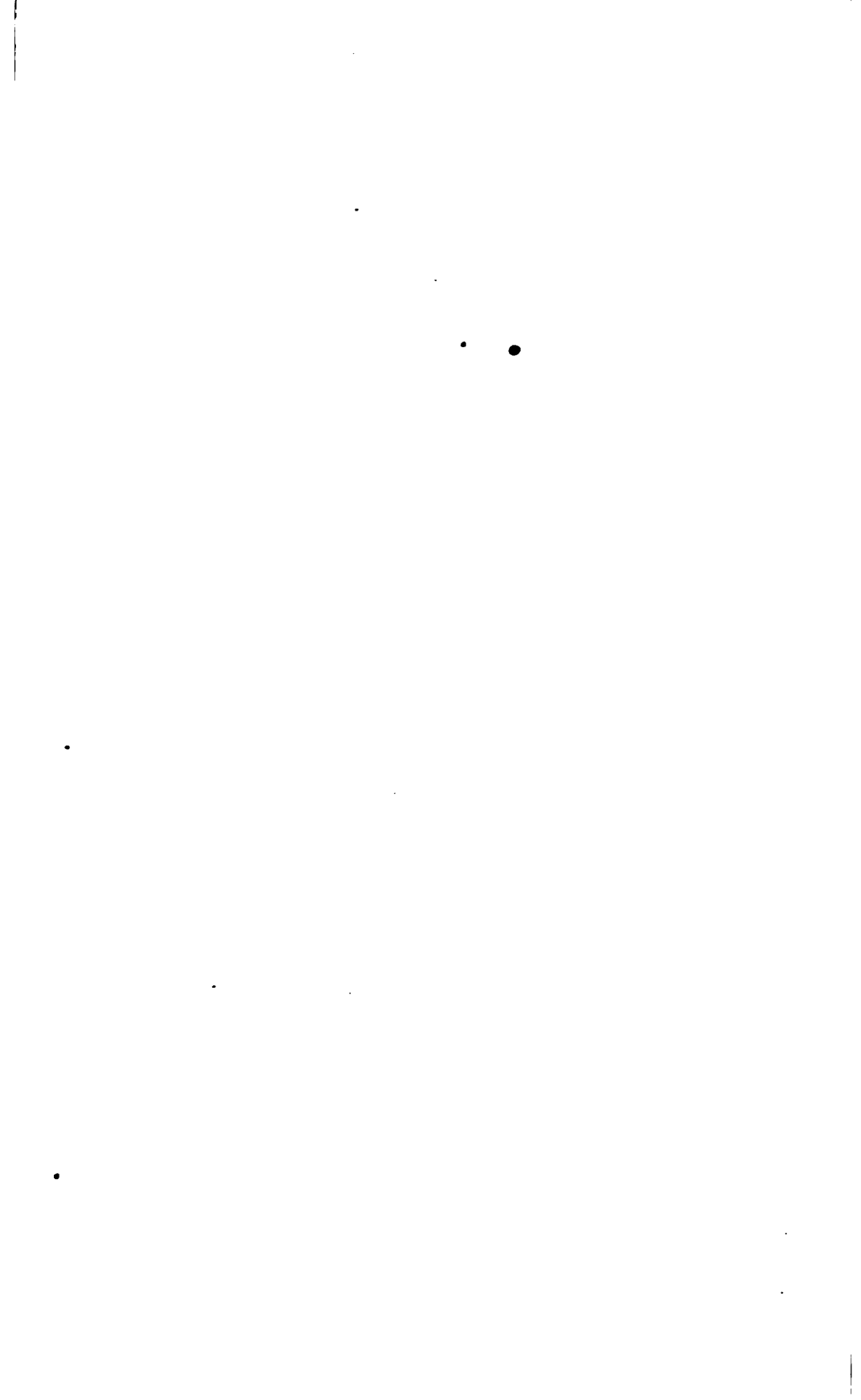
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REPORTS OF CASES

HEARD AND DECIDED IN THE

HOUSE OF LORDS

ON

APPEALS AND WRITS OF ERROR,

DURING THE SESSIONS

1831, 1832, AND 1833.

By C. CLARK AND W. FINNELLY, ESQRS.,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

VOL. I.

BOSTON:

LITTLE, BROWN AND COMPANY.

1873.

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CASES

IN THE

HOUSE OF LORDS,

ON APPEALS AND WRITS OF ERROR.

ON APPEAL,
FROM THE COURT OF EXCHEQUER.

WILSON *v.* LORD KENSINGTON.

1831.

THOMAS WILSON		<i>Appellant.</i>
The Right Honourable WILLIAM, Baron KEN-	}	<i>Respondents.</i>
SINGTON, of that Part of the United King- dom called Ireland, and EDWARD MEREDITH		

A custom to pay one-twentieth instead of the full amount of tithes, though proved to be very ancient, cannot be supported by such proof alone, but must be shown to have had a legal origin. In a case where this proof of legal origin was wanting, the House of Lords, affirming a decree of the Equity Exchequer, *held* the tenants of the lands liable to account for the full tithes.

THE rectory of Llanbister, in the county of Radnor, is appropriated as a prebend to the Chancellor of the cathedral church of St. David's.

* On or before Michaelmas-day, 1824, the respondent, * 2 Lord Kensington, was lessee for lives of this rectory; and the respondent, Edward Meredith, was lessee for years, under his Lordship, and they have ever since continued to be such lessee and under-lessee.

Part of the parish of Llanbister is distinguished by the appellation of the Upper or Gollon Division, on which stands a chapel, called Abbey Cwmhir Chapel; and the rest is known as the Lower Division, on which stands the parish church. The upper division lies within a manor called the Manor of Gollon, and consisting of two townships; viz., the township of Gollon, in the hundred of Knighton, and the township of Kefn (or Cefn) Pawl, in the hundred of Kefn (or Cefn) Llŷs. And the lower division, which lies within a different manor, consists of several hamlets; among which are three hamlets called Trylwydon, Peinherney and Parogey.

The vicar is entitled to all tithes, great as well as small, arising within the three hamlets just mentioned; and is not entitled to any tithe whatever arising within any other part of the parish.

On and before Michaelmas-day, 1824, and thenceforward, the appellant occupied a farm and lands in the township of Kefn Pawl, called Kefn Pawl Farm; to which are appurtenant common of pasture and common of turbary, on part of a waste or common called Lwyngoch Hill, lying within the same township.

The respondents, by their bill, filed in the Court Exchequer in Trinity Term, 1827, against the appellant, Stephen Pugh, the Rev. David Lloyd, clerk, vicar of the parish of Llanbister, and John Cheesement Severn, set forth their title to * 3 the effect above stated, * and alleged that until Michaelmas-day, 1825, a composition had been accepted, but that the said Stephen Pugh and the appellant were accountable for tithes from that day; and after suggesting a pretence on the part of the said Stephen Pugh and the appellant, that from time immemorial the occupiers of their farms, lands, and right of common had been accustomed to yield or pay to the prebendary and parson of Llanbister one-twentieth part only of the tithable matters arising therefrom; the respondents submitted that, supposing such custom to have prevailed, the same was unreasonable, illegal, and void; and the prayer of the bill was, that the said David Lloyd might set forth whether he claimed any title to or interest in the tithes, which were the subject-matter of this suit, and that the said Stephen Pugh

and the appellant might be decreed severally to account with the respondent Edward Meredith for the value of the same tithes, and pay to him what upon such account should appear to be due. •

By his answer, filed on the 12th of June, 1827, the appellant, admitting his occupation of the lands in question, and admitting the respondents' title to a moiety of the tithes, submitted to account, if the respondents should establish their claim to the entirety. But the appellant, among other things, alleged, that the manor of Gollon comprised divers townships and parts of townships in the county of Radnor, and, amongst others, the whole of the several townships of Gollon and Kefn Pawl, and that this manor was in ancient times a parish of itself, and still was so in fact, although the same, in modern times, had by reputation been considered to be within the parish of Llanbister, and other adjoining parishes: that one moiety of the tithes, as well great as small, yearly arising in the whole or most parts of the manor of * Gollon, and in particular in the parts thereof which * 4 comprise the townships of Gollon and Kefn Pawl, belonged to the monastery of Cwmhir before and at the time of the dissolution of that monastery, to which also the manor of Gollon and the appellant's farm and lands, with the common appurtenant thereto, also belonged; that the said manor, &c., and the said moiety of tithes, upon the dissolution of the monastery, came to the Crown; and now belong to the appellant by a title derived from and under a grant or grants of King Henry the Eighth: that for many years past the lessees of the prebendaries of Llanbister had received one moiety of the tithes arising in those parts of the manor of Gollon which comprised the township of Gollon and Kefn Pawl, and which in modern times had, by reputation, been considered to be within the parish of Llanbister, and particularly one moiety of the tithes of the appellant's said farm and lands, with the said rights of common appurtenant thereto; and the appellant alleged that certain tithes were satisfied by the payment of moduses or customary payments, within the parish of Llanbister; that the lessees of the said prebendaries had received the moiety of tithes within those parts of the

manor of Gollon which comprise the townships of Gollon and Kefn Pawl, upon the footing of the said moduses or customary payments; and that as to one estate within the township of Gollon they had received the sum of 13s. 4d. as a modus or customary payment in satisfaction of all the tithes which they claimed to receive of and from such estates.

The vicar, Mr. David Lloyd, by his answer said that he did not claim any tithes from the townships of Gollon and Kefn Pawl.

* 5 The only documentary evidence produced on the * part of the respondents was a terrier from the registry of the Archdeacon of Brecon, within whose archdeaconry the parish of Llanbister is situate, made on the 17th of March, 1720, and renewed and confirmed and signed by the vicar, curate, churchwardens, and seventeen of the principal parishioners of Llanbister on the 4th of October, 1757. The following are among the most important of its contents: Easter-offerings are payable to the vicar by every inhabitant of the parish, and fourpence is payable yearly to the parish clerk or sexton by every housekeeper in the parish "who farms (lands of the value of) 40s. per annum, or keepes a team;" the tenth of all corn and grain raised in the said parish, except within the manor of Gollon, is due in kind, and other articles are tithable in a customary manner; "but in that parte of the said parishe which is in the said lordshipp or manor of Golon, being abbey lands, there is but the moiety or one halfe parte of all the tithes before mentioned due and payable by the custom of the said manor."

Three witnesses proved the payment by them, and by others within their memory, of full rates and tithes in respect of lands situated within the manor of Gollon. These were paid to the parish of Llanbister, and the witnesses were present at the parish meetings of Llanbister in right of these lands.

The appellant gave in evidence royal charters of King John, King Henry the Third, and King Edward the Third, whereby the Abbey of Cwmhir, instituted for monks of the Cistercian order, was endowed with (*inter alia*) the manor of "Gollon," and lands called Kefn Pawl; but no mention was

made of a parish, rectory, or church of Gollon or Llanbister, or of any other parish, rectory, or church, or of tithes, or a moiety or other portion of tithes.

* From an entry in a book lodged in the British * 6 Museum, it appeared that, by a charter of 1288, a collegiate church of Abergwyly was founded for secular priests, and endowed with several advowsons, among which was "the church of Llanbister."

From another entry it appeared, that by a charter of 1299, six advowsons were granted by the Crown to the Bishop of St. David's, to be by him annexed to the churches of Abergwyly and St. David's: one of the six was called the church of "Kollan."

From other entries it might be collected that Abergwyly was shortly afterwards united to and merged in the cathedral church of St. David's, and that in the year 1385 the church of Llanbister was constituted a prebend for the chancellor of that cathedral.

The appellant insisted that "Kollan" must have been identical with "Gollon," and have signified the advowson of a parish comprising the lands in question.

The appellant also put in a minister's account from Michaelmas, in the thirtieth year of King Henry the Eighth, to the Michaelmas following, of the "lordships, manors, lands, and tenements, and other possessions whatsoever, as well temporal as spiritual, belonging to the monastery of Cwmhir, which had been dissolved in the twentieth year of the reigning king. The demesne lands were mentioned as demised to John Turner, gentleman, at the yearly rent of 10s.: under the head of 'rents in Gollon,' were specified eighty-one tenements, let to differents tenants, at rents amounting to 17l. 14s. 7d., which, with 18s. 8d. for the rent of twenty-eight bushels of oatmeal, price of bushel 8d.," made the total of rents in Gollon 18l. 13s. 3d.: among the tenements in Gollon were "Keven y Pawle," in the tenure of Tevan David ap Tevan, at the yearly rent of 3s. 4d.: and another * "Keven y * 7 'Pawle," in the tenure of Meredith David Phillips, at the yearly rent of 5s. 4d.: no mention was made of tithes, or

a moiety or other portion of tithes, or any composition in lieu of tithes.

By a royal grant of 28th July, 1545, the site and demesne lands of the abbey tenements in Gollon were let at rents partly in money and partly in oatmeal. There was another grant by King Henry the Eighth, in the thirty-eighth year of his reign, to George Owen and John Bridges, of other parts of the possessions of the dissolved abbey; viz., the manor of Gollon and certain parcels of land in the town, fields, or parish (*villa, campis, seu parochia*) of Gollon. But by neither of the two last-mentioned instruments, nor by the following documents which were also put in evidence, was a grant made of any rectory or tithes.

A license, granted by King Edward the Sixth, in the first year of his reign, for persons claiming under the grant of 37 Hen. 8, to alienate the premises thereby granted, which were mentioned to be situate in the parishes of Llanbister, Gollon, and Cwmhir.

An *inquisitio post mortem* in the second year of Queen Elizabeth, on the death of John Williams. The manor of Gollon, the site and demesne lands of the dissolved monastery, and divers tenements in Gollon, were among the property of which he is said to have died seised.

An indenture of covenant, dated 7th May, 1565, whereby Nicholas Williams covenanted to convey and assure to William Fowler and his heirs the manor of Gollon, the site and demesne lands of the monastery, and divers tenements in Gollon.

An indenture of feoffment, dated 25th May, 1565, whereby the same were conveyed and assured accordingly.

* 8 * A license, granted by Queen Elizabeth, in the eighth year of her reign, for Nicholas Williams and Mably his wife, to alienate the manor of Gollon, the site and demesne lands of the dissolved monastery, and divers tenements in Gollon, to William Fowler and Edward Herbert, and their heirs.

Extract from the Parliamentary Surveys of ecclesiastical benefices, made during the Commonwealth in England (A.D. 1648-1658), beginning thus: "All that prebend or parson-

age of Llanbister, in the county of Radnor, together with all tything, corne, fruits, offerings, oblations, porcons of tyth, commodities, emoluments, advantages, issues, p'fitts, and hereditaments whatsoever or wheresoever."

Title of the terrier of 17th March, 1720, and 4th October, 1757, before produced on the part of the respondents in the following words, viz.: "A true, full, and perfect terrier of the vicarage house, outhouses, buildings, glebe-lands, and of all and all manner of tithes, and rate tithes, portions of tithes, and all other profits, dues, duties, and customs belonging and paid unto the prebendary and vicarage of Llanbister."

Leases granted by the Fowler family; one in the year 1784, one in 1754, two in 1755, one in 1764, of the lands in question, described as situate in the parish of Llanbister, at certain money rents, together with tithes of kids, geese and pigs, formerly paid to the monastery of Cwmhir, or with other chapel dues.

Two presentations, by the Fowler family, to the curacy of the abbey chapel, described as in the parish of Llanbister.

Accounts of stewards of the Fowler family, showing the receipt of pigs, poultry, and other chapel dues.

Record of proceedings in the court of the Archdeacon of Brecon, by a curate of the abbey chapel, in * the year * 9 1791, to recover chapel dues from an inhabitant of the upper division of the parish of Llanbister.

Some parol evidence was given as to the limits of the parish of Llanbister, with a view to show that the upper and lower divisions had been in all respects distinct and separate parishes. The witnesses stated that the manor of Gollon extended over seven townships.

The township of Gollon was not in the same hundred with the township of Kefn Pawl; but these townships together constituted the upper division of the parish of Llanbister.

The upper division had from time immemorial contributed one-third of the expense of keeping the parish church in repair.

Shortly after the dissolution of the Abbey Cwmhir, a chapel was built near its site, which was kept in repair by the owners of the abbey estate until about thirty-five years ago. It had

ever since been repaired at the expense of the parish, two divisions contributing in the same proportion as for repairing the parish church. Each division maintained its own poor.

The same witnesses spoke to the fact of a twentieth part of the produce, or half tithe only, having been paid for lands in the townships of Gollon and Kefn Pawl, and for the rest of the lands in the manor of Gollon, excepting for the abbey farm, which paid a modus of 13*s.* 4*d.* a year, and excepting for lands in the parish of Saint Harmon, which paid full tithes.

The Reverend John Picton George considered the district or place called Gollon, in the county of Radnor, to be a parish of itself, and such was the general reputation. But he did not remember to have heard any old person, now deceased, express any opinion or belief on the subject one way or the other.

* 10 * The cause came on to be heard before the Right Honourable Sir WILLIAM ALEXANDER, then Lord Chief Baron, in January, May, and June, 1830. His judgment, in substance, was, that there was no evidence of a legal origin for the apportionment of the tithes, although the custom seemed to be one of considerable antiquity, and he therefore decreed an account.

This decree the appellant contended should be reversed, for the following among other reasons:—

It appeared from the grant of King Edward I. to David, Lord Bishop of St. David's, 1299, that there was a church, and consequently a parish, of Kollan (Gollon), in the diocese of St. David's at that time. And the grant of King Henry VIII. to George Owen and John Bridges, 37 Henry VIII., of the manor of Gollon, and the license of King Edward VI. to George Owen to alienate the manor of Gollon to John Williams and John Gresham, 1st Edward VI., and the covenant by Nicholas Williams to convey the manor of Gollon to William Fowler and Edward Herbert, all used the terms, "parish of Gollon," so that it must be inferred from these documents that the manor of Gollon, at the date of these various instruments, constituted a parish of itself, and was no part of the

various parishes within which it had been reputed in modern times to be situate.

The townships of Gollon and Cefn Pawl, although reputed in modern times to be part of the parish of Llanbister, yet were treated as a separate division of the parish, were separately perambulated, had a separate churchwarden, levied by themselves a fixed proportion of the church rate, and maintained their poor separately from the other division of the parish.

The chapel of Abbey Cwmhir had the parochial rights of baptism, burial, and marriage belonging to it. *Bap- *11 tisms and burials still took place there, but marriages had not been solemnized in it of late years.

It appeared from the deeds of agreement with the convents of Strata Florida and Alba Landa, that it was not unusual in the diocese of St. David's for monastic bodies to enjoy a part of the tithes of their own lands. The abbey of Cwmhir was of the same order (the Cistercian) as the convents of Strata Florida and Alba Landa.

That the abbey of Cwmhir was seised of part of the tithes of its own lands, might be inferred: 1. From the minister's accounts of the possessions of the abbey, 30 and 31 Henry VIII. (purporting to be an account of its possessions, temporal as well as spiritual), where the reservation of twenty-eight bushels of oatmeal from its lands in the manor of Gollon, valued at 18s. 8d., being one-twentieth of the whole value of the lands (including the oatmeal), 18l. 13s. 4d. pointed out strongly that the oatmeal was a payment in respect of the abbey's moiety of the tithes of its lands in the manor of Gollon. 2. From the mention of "tithes," in some of the title-deeds of the Fowler family. 3. From the reservation of certain tithes in the leases granted by the Fowler family of lands within the manor of Gollon, part of the possessions of the abbey, "as the same had been accustomed to be paid to the abbots of the monastery of Cwmhir." 4. From the payment of chapel dues from this land which had belonged to the abbey of Cwmhir, to the Fowler family, but which chapel dues for many years past had been received by the curate of the chapel. These chapel dues might be a render

in lieu of the oatmeal mentioned in the minister's accounts; that the render was of a spiritual nature appeared from the proceedings in the Ecclesiastical Court to enforce the payment of it.

* 12 * The nomination of the curate to the chapel of Cwmhir by the Fowler family, was a proof of its independence of the parish of Llanbister, and of an appropriation of tithes to the abbey of Cwmhir, to whose possessions the Fowler family succeeded, such nominations properly belonging to those to whom the tithes were appropriated. The nomination to the chapel should have been in the prebendary of Llanbister if it was a chapel belonging to that parish.

The non-render of one moiety of the tithes of Gollon and Cefn Pawl to the prebendary of Llanbister, as far back as any history went, was undisputed, and the withholding of one moiety, whilst the other moiety was paid, was very different from a mere non-render of any tithes which might be supposed to have arisen from neglect or accident. The payment of one moiety of tithes excluded the possibility of any supposition of neglect or accident. There must have been a legal foundation for the withholding of the other moiety; and where there was much evidence that the manor of Gollon was formerly a parish of itself, and that the abbey of Cwmhir was owner of one moiety of the tithes of the manor of Gollon, the law would be anxious to refer the withholding of the last moiety of tithes to these foundations, or one of them.

The language of the terriers of Llanbister and Llandewy, Istradenny, and of the Parliamentary survey, favoured the notion of the prebendary of Llanbister's being a mere portionist of tithes in the manor of Gollon.

The respondents argued that the decree ought to be affirmed for the following reasons:—

Because the appellant admitted that “in modern times,” the lands in question had, by reputation, been considered to be “within the parish of Llanbister,” * and failed to prove that they are not so in fact. The appellant had not attempted to show, in conformity with his answer, that the lands lay within a parish commensurate with the manor of Gollon; and if from the evidence a propa-

bility arose that the Upper or Gollon division of Llanbister (which was a small portion only of the manor of Gollon) was once a distinct parish, a stronger probability followed that it was incorporate with Llanbister at a very remote period: no trace was discernible of a chapel having on such an union been endowed with tithes; on the contrary, the present Abbey Cwmhir chapel appeared to have been built by a landlord for the convenience of his tenants residing at a considerable distance from their parish church, in substitution of a monastery recently dissolved, at which they had been accustomed to attend divine service; it remained a simple donation in his family until augmented by Queen Anne's bounty; and its minister appeared to have been supported originally by indirect and subsequently by direct contribution of the tenants for whom it was designed.

Having baptism and sepulture (originally conceded as must be presumed by the vicar with the consent of the bishop and patron), this might be a parochial chapel; and with regard to spiritual concerns, such a chapel was scarcely distinguishable from a church; but its temporal appendages were widely different: the curate of such a chapel was not entitled to tithes of common right, though capable of holding them by actual endowment, and was more frequently (as in the present instance) supported by a temporal revenue. The inhabitants of a district, by exclusively frequenting a parochial chapel and keeping it in repair, were not rendered less chargeable for repairs of the mother church (Anon. 17 Vin. 576, pl. 9), nor by maintaining the capellan at their sole

* charge were they relieved from rendering tithes to the * 14 incumbent of the church. Accordingly, the inhabitants of the townships of Gollon and Kefn Pawl had always been subject to compulsory church rates, and to payment of tithes, both great and small, to the rector or vicar of Llanbister. Whether the proper quantum of tithes had been paid was a point to be separately considered.

The appointment of distinct officers and the levying of distinct rates for different divisions of the parish, the maintenance of its own poor by each division, and the consequent removal of paupers from one to the other, were not peculiar

to Llanbister. Such arrangements were authorized by the statute 13 and 14 Car. 2 and 12, and had been repeatedly recognized and sustained by courts of law.

In Llanbister, sacramental bread and wine for the church were provided; and Easter dues to the vicar, and a salary to the parish clerk, were paid by parishioners, without regard to the district or division in which they resided, and the parish accounts were settled at general meetings of parishioners.

The appellant had failed to prove that the Abbey Cwmhir was endowed with a moiety of the tithes in question.

The charters of endowment had been produced, and not found to contain tithes, or any property of which tithes were a fruit; and on the dissolution of the abbey, no tithes were among its possessions, of which an account was rendered by the proper minister to King Henry VIII.

The appellant had failed to prove a title in himself to a moiety of the tithes in question.

The appellant's claim (which is propounded with some uncertainty) seemed to wear a double aspect, *i. e.*, * 15 * he claimed to be either seised of the inappropriate rectory of a parish distinct from Llanbister, or entitled to a portion of the tithes in the parish of Llanbister.

The same evidences of title were necessary to an inappropriate rectory as to an advowson.

Still more strict proof was required of a title to a portion of tithes. To establish a composition real or exchange of tithes for other property, and *à fortiori* to establish an alienation of tithes without recompense, either the original deed must be produced, or, generally speaking, evidence must be given of its having once existed. Such evidence had never been dispensed with, unless where a deed of alienation might be presumed from a chain of conveyances reaching back for centuries.

But the appellant had no muniments of titles at all.

Grants of King Henry VIII., dated 28th July, 1545, and 8th October, 1546, were the avowed bases of his claim; and supposing the Crown to have been (though it did not appear to have been) seised of the rectory of a distinct parish,

within which the appellant's lands were situated, or of a portion of the tithes of Llanbister parish, neither of the royal grants contained words sufficient to convey such property to the grantees.

The grantees themselves were not considered entitled to a rectory or to a moiety of tithes: for the licenses to alien which they obtained did not include property of either kind, nor was any such found among their possessions when inquiries were taken on their decease.

As far as appeared on the title-deeds produced, none of the parties from whom the appellant derived title ever made the moiety of tithes now claimed, or any rectory or tithes whatsoever; the subject of a settlement, will, mortgage, or other conveyance.

* Though the respondents, and those under whom * 16 they claim, had been accustomed to receive a moiety only of their legal dues, such a custom, being essentially unreasonable, was not obligatory.

The witnesses spoke to usage only, indeed parol evidence could extend no further, and there was no written evidence of a right to retain a moiety of the tithes in question, excepting a terrier, which distinctly states such retention to be warranted only "by the custom of the manor."

A clue to the origin of this custom was afforded by evidence of the district over which it extends having been "abbey lands," immediately circumjacent to a monastery: as the monks might without difficulty have occupied these lands, and would have held them exempt from tithes "*dum propriis manibus excolebantur*," it was not unreasonable for them to stipulate with the incumbent of the parish that their tenants should be subjected to half tithe only; such an arrangement, once made, was likely to grow into an immemorial custom, and as the manor belonged to the monastery, the practice of the abbot and his tenants would be the "custom of the manor."

Such motives might not operate universally among the incumbents of the neighbouring parishes: thus the rector of St. Harmon's, under a conviction that the monks could not conveniently cultivate lands in his parish, might refuse to narrow his legal right.

Judgment.

THE LORD CHANCELLOR. — No doubt whatever can be entertained as to this case. My opinion coincides in almost all matters with that expressed by the Lord Chief Baron ALEXANDER. The question here arises between the parson, prebend of Llanbister, who is also rector of the parish as it now exists, including Gollon, and the owners of the * 17 lands of Gollon, who refuse to * pay more than one-twentieth of the annual produce of their lands, &c., in the way of tithes, alleging that they never have, at any time, paid more than one-twentieth, or, in other words, that no payment of tithes has been claimed as due from those inhabitants to that parson. This is not as it has been put at the bar; a case of peculiar hardship upon the inhabitants: the hardship is necessarily incident to such cases. You cannot prescribe for a custom *de non decimando* where the parson has a right to tithes; so that the mere non-payment set up here goes for nothing. In no one case can a question arise, nor can any case come before the Court, where it could be proved that in no one instance since 1189 has there been a perception of tithes. No man in his senses would think of resisting a claim of tithes on such grounds alone; for by the law of the land one single payment would be sufficient to establish the claim in the face of all the other non-payments. That is the whole of the matter in which I find fault with the judgment, that it puts the case as a question of fact. The appellants must know that a custom of only paying one-twentieth instead of one-tenth is bad in law, and must be rank as a modus; and they are bound to explain how that custom was founded, and to give its legal origin and commencement. It is said that it might originate in one of two ways; my remark on that is, that that cannot be so, for one of these two ways is worth nothing unless the other is established. They first say that Cefn Pawl formerly belonged to a separate parish, and that the parson of Llanbister was but a portioner in the adjoining parish of Gollon, and that he, *quasi* parson of Llanbister, can only prove his rights coextensive with the usage, though he is parson of Llanbister, which now includes Gollon by union.

The second, is that the abbey, as it is called, of * Cwmhir, has always had the moiety of the tithes of * 18 Gollon. This second point would be good, for it would account for the parson of Llanbister only having a right to a portion of the tithes. But I do not see that the appellants prove how Gollon has only paid part of the tithes, for they leave the residue unaccounted for, and this proof ought to be strictly given, for tithes are an undivided thing. They cannot get off paying tithes by showing that one-twentieth only has usually been paid, for they must account for the other twentieth. That they cannot do if the second question is excluded. They cannot prevail at all even if it were to be admitted that Gollon was a separate parish, and that those places which are now called Gollon and Cefn Pawl were separate parishes. The fact of their separation does not prove that the parson of Llanbister was only entitled to a portion of the tithes of Gollon; and until the appellants proved that, and the burden of proof is on them, they cannot succeed in establishing their exemption from payment of more than one-twentieth. If they can show that the abbey of Cwmhir has received, in any capacity, one-half of the tithes of Gollon and Cefn Pawl, that would aid the first proposition, and would account for what had become of the other part of the tithes. The first proposition is either unnecessary or superfluous: it is unnecessary if it does not assume the second, but if it does, it is superfluous. It appears to me that the evidence does not go to the extent required. There is no evidence of the monastery having got these tithes. The 18s. mentioned in the case was a money payment, and might have been made as a payment of rent, or for any thing else; there is nothing to show that it was a payment strictly on account of tithes; and the argument raised on this payment is one of pure inference alone. The * monks * 19 of the abbey of Cwmhir were the lords of the manor of Gollon: there might have been a chapelry attached to that abbey. As it frequently happens in the north of England, it might be that Gollon might have been synonymous with Llanbister, for sometimes a parish gets a name from a leading township, and that is likely, as the abbey itself was in Gollon,

which was properly therefore *caput baroniæ*, and it is remarkable, in confirmation of that supposition, that where Gollon is mentioned Llanbister is not, and where Llanbister is mentioned Gollon is not. But though they might have been at one time separated, yet, as they are now united, that does not lose the right of the parson. There is every testimony of their having been united; it is impossible to say how long. The parson of a united parish has as good a right to the tithes for all as for part; and to say that he has not received them means nothing, for that amounts to a prescription *de non decimando*, which the law does not allow. In every way in which this question can be viewed with reference to the points of law, there cannot be any discrepancy of opinion. I shall therefore recommend your Lordships to affirm the judgment given in the Court below, but without costs.

↓ Judgment affirmed accordingly.

FROM THE COURT OF EXCHEQUER CHAMBER.

HEARLE v. HICKS.

1831. 1832.

JOHN DOE on the several demises of	} <i>Plaintiff in Error.</i>
FRANCIS HEARLE, and ANNA MARIA	
HEARLE, his Wife, and of the said	
FRANCIS HEARLE	
SUSANNA JEMIMA HICKS	<i>Defendant in Error.</i>

[Where there is a clear and manifest intention to devise, it is incumbent on a party alleging a revocation by a codicil to prove that the intention to revoke was equally clear and manifest; if there was only a reasonable doubt, the first devise ought to stand.¹

A testator devised a copyhold messuage, called Plomer Hill House, with the appurtenances, to trustees for his wife for life, and subsequently,

¹ See cases in note (1) *post*, 25.

by one of several codicils, revoking several of the dispositions made by his will of all his freehold, copyhold, and personal estate, he instead of such dispositions devised all his freehold, copyhold, and personal estate, to his daughter. *Held*, that the devise of the estate to his wife for life was not affected by this codicil.]

July 6, 1831.

THIS was an action of ejectment brought in the Court of Exchequer, in Hilary term, 1826, for the recovery of a copyhold tenement and farm, called Plomer Hill House, with the appurtenances, situate in the manor of West Wycombe, in the county of Buckingham. The declaration contained several demises by Francis Hearle, and Anna Maria his wife, and by Francis Hearle alone, on the 15th day of August, 1825. The defendant pleaded the general issue. The cause was tried at Aylesbury, at the Spring assizes for 1826, before Mr. Justice HOLBOYD. The jury found a special verdict, stating in substance that John Hicks was, at the time of making his will, seised in fee of certain freehold lands in Cornwall and Buckingham, and of a certain copyhold messuage or mansion-house, lands, and hereditaments, with the appurtenances, called Plomer Hill House, being the premises mentioned in the declaration, situate in the parish of West Wycombe, in the said county of Bucks: That the said John Hicks, on the 4th day of May, 1821, duly made and published his will in writing, executed and attested so as to pass real estate, and which will (amongst other devises) contained the following:—

* “In the first place, I give and devise all that my * 21
copyhold messuage, &c., called Plomer Hill House, in
the parish of West Wycombe aforesaid, and now in my own
occupation, together with the cottages or tenements, and
premises thereunto belonging, with their appurtenances,
unto and to the use of R. B. Slater, the Earl of Cardigan,
Joseph Holden Strutt, and George Farr, their heirs and
assigns, upon trust for my present dear wife Susanna Jemima
Hicks during her life or widowhood, or until she shall cease
to reside at the said premises, or let the same, or permit
them to be occupied by any other person than herself, she

paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair, and from and after the decease or second marriage of my said wife, or on her ceasing to reside at the said premises, or letting the same to or permitting them to be occupied by any other person than herself, then and in either or any of the said cases, and whichever of the said events shall first happen, my said trustees, their heirs and assigns, shall stand and be seised or possessed of the said copyhold hereditaments, and premises, with the appurtenances, upon and for such trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and declarations as (regard being had to the nature and quality of the tenure of the said copyhold premises) will best or nearest correspond with the uses, trusts, &c., hereinafter expressed and declared of and concerning the residue of my real estates, or such and so many of them as shall be then existing, undetermined and capable of taking effect."

That on the 10th May, the 15th and 18th July, and 14th September, 1822, the said John Hicks added codicils to
 * 22 his will, the last of which (the only one important * to be considered in this case) was in the following terms :

And I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicils of all my freehold, copyhold, and personal estate and effects of all and every kind and description, and instead and in the place of such devise, disposition, and bequest thereof, I do give, devise, and bequeath all and every my freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto my daughter Anna Maria Hearle ; and, from and after the determination of that estate, I give, devise, and bequeath the same unto my grandson John Graves, and his heirs, in strict entail, as in my said will directed, with this additional clause, especial and positive orders, that in case the said John Graves should not be thirty-one years of age at the time my said estates shall devolve on him by the death of my daughter,

that he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years, but that the rents and profits thereof shall accumulate and be in the hands of my trustees for the use and benefit of my said grandson and his heirs; and in failure of issue of the said John Graves, I order that my said estates and effects shall go and descend as is by my said will directed. And I do hereby ratify and confirm the several annuities and donations by me in my said will and former codicils given and bequeathed. And I do further give and bequeath unto my dear wife Jemima one other annuity of one hundred pounds to be paid her in like manner and with the like restrictions as the former ones given her by my will and codicils, hereby in all other respects but what is above-mentioned confirming my said will and codicils.

* This codicil was executed so as to pass real estate. * 23

John Hicks died on the 21st day of June, 1825, seised of his said several estates, without revoking or adding to his will, except as appears by the said codicils respectively, leaving his wife, the defendant, and the said Anna Maria Hearle, one of the lessors of the plaintiff, him surviving.

The question for the consideration of the Court was, whether the devise contained in the will, by which the Plomer Hill estate was given to the testator's wife, had been revoked by the terms of the fourth codicil.

The case was argued in the Court of Exchequer on the special verdict in Michaelmas term, 1826; and in Hilary term, 1827, the Court gave judgment for the plaintiff.

In Easter term, 1827, the defendant below brought a writ of error in the Exchequer Chamber. The case was argued before that court in the following vacation; and in Trinity term, 1827, the Court reversed the judgment of the Court of Exchequer.

The plaintiff below brought his writ of error here, praying that the judgment of the Court of Exchequer might be affirmed, and the reversal thereof by the Court of Exchequer Chamber reversed.

The case was argued before the Judges by *Sir E. Sugden*

and *Mr. Follett*, for the appellant, and by *Mr. Serjeant Russel* and *Mr. Patch* for the respondent.

LORD WYNFORD (who presided as Deputy Speaker). — I am always glad, my Lords, to see the Judges in this House. I am more so now, as I was one of those who advised this judgment in the Court below, so that if they had not been here I should certainly not have taken this seat. His Lordship, after having stated the will and codicil, said, the
 * 24 question for your Lordships * is, what effect this codicil has on the devise of this estate in the will; and for the purpose of deciding that, I shall move that this question be put to the Judges, — Whether, according to the true construction of the will and codicil as above set forth, the devise of the Plomer House estate was revoked by the fourth codicil? The Judges took time to consider the question.

Friday, May 25.

Lord Chief Justice TINDAL afterwards delivered, on their behalf, a judgment, of which we have, by his Lordship's favour, received the following authentic copy: —

My Lords, the question which your Lordships have been pleased to propose to his Majesty's Judges is this: Whether, according to the true construction of the will and codicils which have been stated upon this appeal, the devise in the will of the testator's copyhold messuage or mansion-house, barns, stables, buildings, and pleasure-grounds, lands and hereditaments, called the Plomer Hill estate, was revoked by the fourth codicil: and upon this question, though it must be admitted to be difficult to draw any certain conclusion as to the intention of the testator, the opinion which we have formed, upon the best consideration of these instruments, is, that the devise in the will above specified was not revoked by the fourth codicil. The general principle upon which this opinion proceeds may be stated thus: The testator does by his will show a clear and manifest intention to devise the Plomer Hill estate to his wife for life, or during her widowhood. If such devise in the will is clear, it is incumbent on

those who contend it is not to take effect by reason of a revocation in the codicil to show that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if * there is only a reasonable doubt * 25 whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand.¹ My Lords, it is the opinion of my learned brothers and myself, that the clause of revocation, contained in the fourth codicil, does not apply to the devise in question with such clearness and certainty as to operate as a revocation of that plain and explicit devise contained in the will. In this general conclusion we all agree; but it is scarcely to be expected that, in the discussion of a question of this nature, we should all arrive at the same conclusion upon grounds precisely the same. In stating, therefore, to your Lordships those grounds upon which I have formed the opinion, not simply that there is no clear intention to revoke the devise, but that, upon the proper construction of the codicil, the clause of revocation does not apply to this particular devise, I cannot undertake to say I am expressing the opinion of all my learned brothers in each particular reason which I may advance, although in most of those reasons all concur, and I am not aware that there is any material dissent or diversity of opinion in respect to any. That the testator not only intended to devise to his wife the enjoyment of the house and premises in which he lived during her life or widowhood, but that it was a paramount object with him, appears abundantly by the first will and codicil. It forms the first subject of the devise in his will. "In the first place, I give and devise all that my copyhold messuage or mansion-house, barns, stables, and buildings, pleasure-grounds, lands, and hereditaments, called Plomer Hill House, in the parish of West Wycombe, and now in my own occupation, together with the cottages or tenements or premises thereto belonging, to the * trustees (therein named) and their * 26 heirs, upon trust for my present dear wife Susanna

¹ *Robertson v. Powell*, 2 H. & C. 762; *Freeman v. Freeman*, 5 De. G., M. & G. 704; *In re Arrowsmith's Trusts*, 2 De G., F. & J., 474; *Molyneux v. Rowe*, 8 De G., M. & G. 368; *Williams v. Evans*, 1 El. & Bl. 727; *Evans v. Evans*, 17 Sim. 86; 1 Jarman Wills (3d Eng. ed.), 444, 454.

Jemima Hicks, during her life or widowhood, or until she shall cease to reside at the same premises, or let the same, or permit the same to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair ;” and then, in the event of her death, second marriage, ceasing to reside, or letting the premises, or permitting any other person than herself to reside therein, he directs the trustees to be seised and possessed of these copyhold premises upon the same trusts as (regard being had to the nature and quality of the tenure of the said copyhold premises) will best correspond with the uses declared concerning the residue of his real estates. He afterwards devises to his wife all his money in the funds during her life or widowhood, and after her death or marriage to such person as should be either tenant for life or in tail of his residuary estate, with a power to her to appoint 500*l.*, as therein mentioned, and then gives to her absolutely all the ready money which shall happen to be in his mansion called Plomer Hill House at the time of his decease, all the articles of plate brought by her on her marriage, his family carriage, and the wines, provisions, and provender, live and dead stock, which at the time of his decease “shall be on or about the said copyhold premises,” and then devises “all his household goods; furniture, books, prints, pictures, china, glass, and plate, not thereinbefore bequeathed, unto the trustees, in trust for his said wife during such time as by virtue of his will she shall be entitled to his copyhold mansion and premises, and after the determination of her estate in the same, in trust absolutely for the

* 27 person * who then, either as tenant for life or in tail male, shall be in the actual possession of his residuary real estates.” The testator, therefore, by his will, has not only devised the mansion to his wife, but has shown a clear and anxious desire that his wife should continue to reside in the mansion which he then occupied, and that it should not in any manner be dismantled or unfurnished, but should be enjoyed by her in exactly the same state as that in which it was left at the time of his death. In his first codicil, made after the interval of a year, it is evident that the same inten-

tion that his wife should reside in the mansion-house, in the same state as left at the time of his death, continued to be predominant in the testator's mind; for after reciting the bequest in the will to his wife of the plate, furniture, and other articles before adverted to, he proceeds to revoke such bequest in plain and direct terms, and in lieu thereof bequeaths all his farming stock, household goods, &c., "and all other his effects which should be in or about his residence at Plomer Hill aforesaid, and usually considered as comprised in and constituting his establishment there," unto his wife, for her own use and benefit absolutely. It is further to be observed, that the testator's wife appears to have been, from the time of the making of the will down to the time of making the fifth and last codicil, the object of his peculiar bounty and regard, there being no codicil, with the exception perhaps of the third, which does not materially add to the provision already made for her by the previous dispositions in her favour. The will gives his wife a rent-charge of 300*l.* a year for life, charged upon the residue, with a contingent increase of 100*l.* per annum in case of the failure of issue of his son. By the first codicil, made after the death of his son without issue, he gives * his wife absolutely the addi- * 28 tional annuity of 100*l.* per annum, and bequeaths to her the residue of his personal estate absolutely to her own use. By his second codicil he constitutes her his sole executrix and residuary legatee; by the third codicil, he gives her the proceeds and profits of the five shares which he held in the County Fire-office for her life; by the fourth, the codicil in question, he gives to his wife a further annuity of 100*l.* for life; and by the fifth, he gives to her, and at her disposal, all sums of money which she or the testator might be entitled unto out of the effects of her late father, or that any other friend might leave her: and he orders his executors, in case she shall die before him, to fulfil her will and disposal thereof. This codicil was executed about nine months subsequently to that upon which the question arises. The will thus containing such a clear devise to the wife, with such a manifest indication of intention that she should reside in the mansion-house called Plomer Hill, and each codicil containing proof

that the regard of the testator for his wife continued unabated and unimpaired until long after the execution of the fourth codicil, the first observation that arises is, that it is extremely improbable in itself that the testator should, by general words, without making any reference to his wife, or any disposition in lieu thereof in her favour, revoke the only devise of land which he had made to her, which forms the first subject of his will, to which repeated allusions are made in the will itself and first codicil, and her residence in which during her widowhood appears to have been the favorite object of his mind. Still, however, the question arises, whether he has, by the fourth codicil, revoked this devise or not. That the words used in the codicil do not necessarily revoke this devise is sufficiently manifest by referring

* 29 * to them. The testator begins by saying, " I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicil of all my freehold, copyhold, and personal estate and effects of all and every kind and description ;" and concludes it by saying, " that hereby in all other respects but what is above mentioned confirming my said will and codicils." There are no words, therefore, expressly revoking this devise ; on the contrary, if we hold all the dispositions of his real estate to be revoked, we construe the codicil directly against the testator's declared intention. It is as much open to argument that the devise to the wife may be one of those, or the very one, which the testator intended to confirm, as that it was one of the several which he intended to revoke. Whether, therefore, this devise was revoked must be determined, not by any express words to that effect, but by the consideration, whether, upon the construction of the codicil, the devise and disposition therein contained must of necessity be held inconsistent with the devise to the wife ; or whether such a construction may be put upon the devise in the codicil, that both the will and the codicil may stand together.¹ To consider this question, it is necessary, in the first place, to observe how the disposition of the testator's property stood under the will, and the first cod-

¹ See *ante*, 26, note (1).

icil, at the time when the fourth codicil was made; and upon a careful inspection of the will and first codicil, it will be found that at the time of executing the fourth codicil the testator's real property stood thus disposed of, viz., the copyhold estate (the Plomer Hill House) was devised to the wife for life, the remainder forming part of the residue. The Treravel estate stood thus: an equitable * estate to his * 30 daughter, Anna Maria Hearle, for life, for her separate use, remainder to her husband for life, remainder to her children in tail, as tenants in common, the remainder forming part of the residue. The residue of his property, consisting of the manor and advowson of Bradenham, two freehold farms in the county of Bucks, and so much of the testator's estate in the Plomer Hill House and the Treravel property as was undisposed of, and also comprising all his personal property, except the partial interests given to the wife, which have been before enumerated, formed one mass, which, at the time of making the fourth codicil, in consequence of the death of his only son without issue, stood devised immediately to the testator's grandson, John Graves, for life; remainder to his first and other sons in tail male; remainder to the first and other sons of the testator's daughter, Anna Maria Hearle, in tail male; remainder to his own right heirs. Whilst his property stood thus disposed of, the fourth codicil is made, in which, after declaring his intention to revoke several of the dispositions made by him in his said will and codicils of all his freehold, copyhold, and personal estate and effects of all and every kind and description, "instead and in the place of such devise, dispositions, and bequests thereof, he gives, devises, and bequeaths all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto his daughter, Anna Maria Hearle, and from and after the determination of that estate, unto his grandson, John Graves, and his heirs, in strict entail, as in the said will mentioned;" with the additional clause in the codicil as to the time when John Graves shall take: and in failure of such issue of the said John Graves, he orders that his said * estate and * 31 effects shall go and descend as is by his said will di-

rected; and then ratifies and confirms the several annuities and donations by him in his said will and former codicils given and bequeathed; and gives a further annuity of 100*l.* to his wife, under the same restrictions as the former. Now if this devise in the codicil can be construed to be confined to the property which formed the testator's residue only, then the devise in the will of the copyhold estate in question to the wife for her life will remain unrevoked, and the object of the testator in his codicil may still be carried into effect; and that such may be the construction, without violating the words of the codicil, appears to be by no means unreasonable. In the first place, the codicil professes to make void "several of the dispositions heretofore made by him in his will and codicils of all his freehold, copyhold, and personal estate and effects of all and every kind and description." Now the only disposition made of all his freehold, copyhold, and personal estate and effects, is that devise which relates to the residue, in which all his property, freehold, copyhold, and personal, is brought together in one mass, with the exception of that part of the personal estate which is given to the wife absolutely by the will, and which is expressly confirmed to the wife by the subsequent part of this very same codicil. In the second place, the testator says, "instead of such devise, disposition, and bequest," using the singular number, which would in strict grammatical construction be applicable to the devise or disposition of the residue, but not to the various dispositions contained in the will. In the third place, the death of his only surviving son, William, who was the first taker for life under the clause disposing of the residue, makes it not

* 32 improbable that he should wish to substitute in the residuary clause his only surviving daughter to take the same estate therein which was before given to the son. In the fourth place, if the devise to the wife of the copyhold estate is to be held to be revoked, then, not several only of the dispositions of the real property contained in the will, but all such dispositions are revoked or altered; for the wife's life estate in the Plomer Hill property is gone; the equitable estate for life given by the will to the daughter in the Treravel estate for her separate use is merged in a legal estate for

life, given to her generally, and the daughter has a life-estate in the residue, now for the first time interposed before that of John Graves. But to revoke all the dispositions of the realty in the will and codicil is against the express directions of the testator. Still further, if the devise of the Plomer Hill estate to the wife is revoked, inasmuch as the codicil confirms the donations made in the will and codicil, the wife would still be entitled absolutely to the furniture, and to every thing which constitutes the establishment of that house. So that the house, upon the death of the late testator, would immediately go to the daughter, but stripped and dismantled of all its furniture and establishment, which the testator appeared anxiously to intend should be kept together. Again, the codicil gives an immediate estate for life to A. M. Hearle, and from and after the determination of that estate, to his grandson, John Graves, and his heirs, in strict entail, "as in his said will directed." Now this express reference to the will draws the attention to that part of the will in which alone there is any mention of John Graves, that is, to the disposition of the residue. It seems, therefore, a very reasonable construction of the codicil to infer, that as the ultimate remainder of the property intended to be thereby disposed of is limited by express * reference to the clause in the will which * 33 contains the devise to John Graves in strict entail, the property itself devised by the codicil, is the same property as that contained in the devise of the will to which such reference is made, viz., the residue only. By this construction the only alteration effected by the codicil is, the substitution of a devise to the daughter for life, instead of that given to the son, to take place immediately next before the estate given to John Graves. But if the devise operates on the residue only, as before mentioned, it leaves the particular estate already devised to the widow untouched. There are undoubtedly some difficulties attending the construction of the will and codicil, whichever way they are construed. It may be said against the construction above made, that the words of devise in the codicil to the daughter are immediate, and that the testator, by his first codicil, shows that he knew how to interpose a new estate, by proper terms, between those already

created by the will. It certainly is so; but it is obvious, in comparing the frame of the first and the fourth codicils, and looking to the description of the witnesses to each respectively, that the former was made with, the latter without, legal assistance; so that no great reliance can be placed on that argument. It may be argued again, that the testator by the codicil directs, that in case his grandson shall not be thirty-one at the time the estates shall devolve on him by the death of the testator's daughter, the rents shall accumulate for his benefit, and that if the wife took a life-estate in the copyhold, *non constat* that she might survive the daughter, in which case the Plomer Hill estate would not devolve to the grandson on the daughter's death. But it is not at all surprising for a testator, in preparing such an instrument, to have overlooked or not cautiously provided for the possibility of his

* 34 wife outliving his daughter, * the more especially when the devise to the wife related only to part of the estate.

It may further be contended that, by the fifth codicil, the testator has proved that he was aware that the fourth codicil had revoked the estate for life, which he had previously given by the first codicil, to his son-in-law: for he could not otherwise have devised to him the rents and profits of the Treravel estates during his life. It must be granted that the fourth codicil had necessarily that effect; but this arises not from his devise of the life estate to his daughter, for the only effect of that devise was to convert her equitable estate for her own separate use into a legal estate for life, but it arises from the devise to the grandson being made "from and after the determination of that estate," words which necessarily excluded the devise to the son-in-law, which he had before made by his first codicil. This argument therefore does not seem to turn upon the question whether the life-estate to the widow is revoked or not. Upon the whole, although these and perhaps other difficulties may be urged against the construction above proposed, we think the *onus probandi* of showing that the devise to the wife is included in the clause of partial revocation is cast upon those who claim under such revocation, and that it is not shown with sufficient certainty that this devise to the wife is included in such clause; on the

contrary, that upon the proper construction of this codicil the intention appears to have been that the devise to the wife should not be revoked by the codicils. Upon these grounds we think the devise in question has not been revoked.

The Lord Chancellor expressed his concurrence with the opinion of the Judges, and moved that the judgment of the Court of Exchequer Chamber be affirmed; and it was affirmed accordingly.

* APPEAL

* 35

FROM THE COURT OF EXCHEQUER.

GARDINER v. SIMMONS.

1832.

WILLIAM SPELLS GARDINER *Appellant.*
STEPHEN SIMMONS *Respondent.*

Practice.

If the appellant does not appear to support his appeal, the respondent's counsel are not compellable to go on, but the appeal may be dismissed, and the House will afterwards exercise their discretion as to the costs.¹

June 21.

THIS was an appeal from an order of the Court of Exchequer arising out of the following circumstances: The defendant was a farmer, holding certain lands in the parish of Lindfield, in the county of Sussex, and, in the month of June, 1825,

¹ See *Martin v. D'Arcy*, 3 H. L. Cas. 689; *Honeyman v. Marryat*, 6 H. L. Cas. 112; *Ricketts v. Lewis*, 2 Cl. & Fin. 100; *Fraser v. Gordon*, 3 Cl. & Fin. 718; *Scanlan v. Usher*, 3 Cl. & Fin. 561; *Murphy v. Conway*, 9 Cl. & Fin. 73; 2 Dan. Ch. Pr. (4th Am. ed.) 1501. Where neither party appears the appeal will be dismissed without costs. *Sherburne v. Middleton*, 9 Cl. & Fin. 72.

was made a defendant in an amended bill, filed by one John Henry Nainby, against several holders of land in that parish, praying for an account of the tithes of their lands. The respondent appeared and put in his answer; and by an order of the Court in July, 1827, the bill was ordered, as against the respondent, to be dismissed with costs for want of prosecution, unless cause should be shown to the contrary at the sittings after the then Trinity term. Cause was not shown, and the bill being accordingly dismissed, the respondent's costs were afterwards taxed at 32*l.* 17*s.* These costs were not paid; and the respondent finally obtained an order, on the 7th May, 1828, directing a writ of sequestration to issue to sequester the said J. H. Nainby's personal estate, and the rents, issues, and profits of his real estate, for payment of the same. The writ was accordingly issued: but the appellant,

having put in a claim as lessee of all the tithes of Lind-
 * 36 field, the sequestrators * served him with notice thereof, and required him to pay them all sums of money that might be due from him to the said J. H. Nainby. On proof of this service, and of demand of payment, the Court, on the 20th November, 1829, ordered that the appellant, within a week, should show cause why he should not attorn as tenant to the commissioners under the sequestration, and why he should not pay to them the sum mentioned in the writ, and the costs of the sequestration, and of that application. The appellant showed cause against this order on affidavits, stating that he was tenant to one Maria Williamson, and not to J. H. Nainby. The Court, by an order dated the 16th December, 1829, referred it to the Master, to inquire whether, at the time of the service of the writ of sequestration, the tithes belonged to Nainby; and directed that Maria Williamson should be at liberty to come in and be examined upon her claim of interest; that all parties should produce all books and papers relating to the inquiry, and be examined on interrogatories as the Master should direct; and that the Master should make his report to the Court. From the orders of 20th November and 16th December, 1829, the appellant appealed, alleging, that supposing him to have been lessee of the tithes to Nainby, yet that any money payment reserved

in respect of such demise was not a rent, but only a sum of money due on a special contract, and therefore a mere *chose in action* which could not be rendered available to a sequestration: that such money, due at the time of the service of notice of the sequestration, would not run with the land to an heir or subsequent purchaser, and therefore could not be made the subject of an attornment; and that the question of fact raised by the affidavits on showing cause, being, whether the appellant was lessee of the tithes * to * 37 Nainby, and not to whom those tithes belonged, the latter question had been improperly referred to the Master. The respondent insisted that the order was in all respects conformable to the established practice of Courts of Equity, in cases where third persons were in possession of property belonging to parties whose property was amenable to the process of those Courts; that the rent of tithes might be made available to sequestration; and that the supposed alienation of the tithes by Nainby was collusive, and made with a view to defeat the sequestration.

The case was fixed for argument on the 21st June, 1832; on that day *Sir E. Sugden* appeared at the bar on behalf of the respondent, but no counsel attended for the appellant.

The Lord Chancellor inquired into the cause of this circumstance.

A gentleman, who appeared as agent for the appellant, said he had received a notice of this case so late on the preceding evening, that he had not been able, though after using every exertion, to obtain the attendance of his counsel. He requested that some delay might be permitted.

Sir E. Sugden consented, on condition that the costs of the day were paid.¹ As this condition was not accepted,

The Lord Chancellor asked if the respondent's counsel

¹ When the appellant was present, but not his counsel, the appeal stood over, on payment of the costs of the day. *Godson v. Hale*, 7 Cl. & Fin. 594; and see *Flight v. Thomas*, 8 Cl. & Fin. 281.

would go on with the argument in support of the judgment of the Court below, and move that the appeal be dismissed.

Sir E. Sugden declined to do so, observing that the judgment was a good judgment, and wanted no support.

* 38 * If the appellant's counsel had appeared, he should be ready to answer any thing that might be advanced against the judgment, but as nothing was advanced against the judgment, it stood on its own merits, and their Lordships might do as they thought fit with the petition of appeal.

THE LORD CHANCELLOR. — The course which I shall recommend to the adoption of your Lordships, is to dismiss this appeal, and to state in the order that the dismissal is for the want of the appearance of the appellant, and that you will reserve to him the liberty of making an application to your Lordships, if he has any special circumstances to show on which he can ground such application. In the meantime, however, I should propose to dismiss the appeal for the want of the appearance of the party; and, having regard to the peculiar circumstances disclosed upon the case, I should propose doing so with 100*l.* costs. His Lordship, however, afterwards added: Instead of dismissing the appeal with costs, I should propose that an account of the costs incurred on the part of the respondent be given in, and then, if the appellant thinks fit to make any application to your Lordships, we may determine on what conditions alone we can listen to it.

In a subsequent case, where the same question arose, their Lordships referred to this case as the precedent they should follow under similar circumstances.

* APPEAL

* 39

FROM THE COURT OF C. P. AND K. B.

DUVERGIER v. FELLOWES.

1882.

AJME DUVERGIER *Plaintiff in Error.*
 WILLIAM DORSET FELLOWES *Defendant in Error.*

No action can be maintained on a bond given to a person in consideration of his doing something contrary to the terms of letters-patent;¹ and he is equally incapable of recovering, whether he knew or did not know the terms of the letters-patent.

The illegality of the condition of the bond may be shown by the plaintiff in stating the bond itself, with the condition, in his declaration;² or, if he omit to state the condition, it may be shown by the defendant in his plea, and the Court will equally take notice of the illegality in either case.

Semble. If two Courts have been of the same opinion on any point, and their judgments are appealed from and affirmed, the House of Lords will give costs on the affirmance.

July 8.

THIS was an action of debt on bond. The defendant cravedoyer of the bond and condition. It then appeared, that the bond was given to secure to the plaintiff the sum of 10,000*l.*, if he should succeed in procuring subscribers for 9000 shares, of 50*l.* each, in a patent distillery company, which it was the object of these parties to form. A person named Jean Jacques St. Marc had obtained letters-patent for the distillation of spirit from potatoes, and he, together with the defendant and another person, carried on the distillery business, under these patents. It was proposed to form a company to engage in this business, and the plaintiff *undertook to procure the subscribers, for * 40 doing which he was to receive the sum stated in the

¹ See *Chitty Contr.* (9th Eng. ed.) 614; (10th Am. ed.) 729-782 & notes

² See 1 *Chitty Pl.* (14th Am. ed.) 369.

bond. The defendant pleaded, that, by the terms of the letters-patent, if the grantee should, during the continuance of the grant, make any transfer or assignment, or pretended transfer or assignment, of the privileges thereby secured, to any number of persons exceeding the number of five, or should open any books for that purpose, or should, with other persons, presume to act as a corporate body, the letters-patent should cease and become void. The plea then alleged that the proposed company was intended to consist of more than five persons, and so the bond was void in law. There were two other pleas, varying the mode of stating this defence, and to all the three pleas there was a general demurrer. Judgment was given for the defendant in the Court of Common Pleas, in Michaelmas term, 1828 (see 5 Bing. 248); and that judgment was affirmed on error in the Court of King's Bench, in Easter term, 1830 (see 10 B. & C. 826). The plaintiff brought a writ of error, praying that the House would reverse both of these judgments.

Mr. Follett and *Mr. Smirke*, for the plaintiff in error, contended that the plaintiff's right of action in this case was on the obligatory part of the bond, and that the condition of the bond would not prevent him from recovering unless that condition were in itself illegal. It was said that the whole transaction was a fraud upon the public. There was, however, no allegation of that sort in the pleadings, which merely put the case on the ground of want of consideration; and even if the transaction was fraudulent, it was doubtful, on the face of these pleadings, whether the plaintiff was not the victim instead of the practiser of the fraud. Now,

* 41 in order to deprive the plaintiff of his right to *recover on this bond, it must be shown that he was a guilty party in the fraud. This was stated to be a monopoly contrary to the common law. Lord TENTERDEN, in the judgment in the Court below, said, "I am of opinion that the proviso in the patent has the effect of rendering the bond altogether void;" and Mr. Justice LITTLEDALE added, "All monopolies are illegal, unless allowed by a patent, which cannot be assigned at all unless power to that effect is given by the

Crown." What was a monopoly? It was thus defined by Lord COKE, 3 Inst. 181: "A monopoly is an institution or allowance by the King, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, working, &c., whereby any persons, &c., are sought to be restrained of any freedom or liberty that they had before in their lawful trade." If there were no legal means of assigning this patent, it would become void as soon as it was assigned: but if it could be legally assigned, then it became a legal monopoly. If it was possible for the Court to discover a legal mode of carrying on business, they would not presume that the parties were actuated by an illegal intention. The mystery alone did not make the business illegal, for mystery was almost a synonym with trade; and an indenture of apprenticeship bound a master to teach the apprentice the mystery of his art, and bound the apprentice to keep the secrets of his master. The impossibility of the engagement did not make it illegal. Suppose a man bound himself to a society, to secure for them the exclusive enjoyment of light and air, the engagement on his part would be impossible, but not illegal. The cases of the *King v. Webb*, 14 East, 406; *Pratt v. Hutchinson*, 15 East, 511; *Davies v. Hawkins*, 3 M. & Sel. 488; *Josephs v. Pebrer*, 3 B. & C. 639; and * *Nockells v. Crosby*, 3 B. & C. 814; all showed that the merely making shares transferable would not of itself constitute an illegal society. Then came the question, whether the parties in this case had acted as a corporation. A body of men might use a common seal, act by the voice of the majority, sue by one attorney, and make by-laws, without assuming to act as a corporation, in the illegal sense of the words. These parties did not claim to be a corporation; though doing that would not of itself be illegal. The only case on that subject was in Co. Entries, 427, where it is charged against certain parties, "quod per spatium unius anni absque aliquo warranto, sine regali concessione infra dictam villam diversas libertates," &c., and it then went on to allege, not only the use of a corporate name, but the assuming to do other acts which could not be legally done but by a corporation. There

the offence was held to consist, not of the mere claim, but of the actual doing of corporate acts, without which the mere claim to be a corporate body would have been no offence whatever. Suppose a company were to be formed to take lands in succession: a conveyance made to them for such a purpose would be null, but their object in itself would not be illegal, though they attempted to do an act which only a corporation could do. If a stranger claimed to be mayor of a corporation, that alone would not make him subject to a *quo warranto*, for the act would be merely nugatory. To say that a body of men assumed to act as a corporation, did not necessarily involve the consequence that they assumed to act so illegally, in the same manner as the use of the word swindler had been held by the Court not necessarily to mean illegal swindling, but that it might be referred to common abuse. It was said that the company had attempted to

* 48 raise money * by illegal means; but if the acts of the company were not illegal in themselves, the raising of money for the purposes of those acts was not necessarily illegal. The decisions of the two Courts had proceeded on different grounds: that of the King's Bench determined that the letters-patent were not assignable; that of the Court of Common Pleas referred entirely to the illegality of the attempt to divide the benefit among more than five persons. There was nothing on the face of the bond that would make it illegal. It was said that the plaintiff must know that to form a company of more than five persons for the purpose of working this patent was illegal; but there was not one of the pleas which stated his knowledge of the terms of the patent, or which showed that he was at all aware of the illegality. The King might grant a patent without such a restriction as existed in the present case, and there was nothing to shew that the plaintiff knew the King had not done so here. The plaintiff had done all he had undertaken to do, and was therefore entitled to the stipulated compensation. If the condition was illegal, then certainly the bond must be admitted to be void; but if the condition was only impossible, it was then turned from a bond with a condition to a simple bond. Touchstone, 372, and Bacon, Abr. Obliga-

tion, E. 1, were authorities on this point. The want of power to assign was not a defence to an action on the obligatory part of the bond. The plaintiff need not have averred performance of the condition; the defendant must show its non-performance by way of defence. Suppose the bond had been on condition that the plaintiff should procure a purchaser for the estate of the defendant, if it should turn out that the estate was not saleable, that would not be an answer to the plaintiff's claim. Nothing short of *a *44 contrivance to cheat and defraud, in which the plaintiff was a party, would be an answer to the action. There was no allegation of that sort in the present case. The 6 Geo. 1 was repealed before this bond was entered into; and it was to be observed, that all the authorities were cases under that statute, yet even in those cases the merely making the shares transferable, or seeking to act as a corporate body, had not been held to be illegal. The *King v. Cawood*, 2 Lord Raymond, 1361; and the *King v. Dodd*, 9 East, 516, were cases on the statute. In the latter of these it seemed to be the opinion of the Court that the intention of forming a company would not be within the statute, without reference to the fact of such intention having a tendency "to the common grievance," &c., in the particular instance. The next case was the *King v. Webb*, 14 East, 401. In the sixth count of the indictment there, every thing was to be found which appeared in the pleas here, yet Lord ELLENBOROUGH held, that the offence there charged was not within the statute. The case of *Pratt v. Hutchinson*, 15 East, 511, was also a case upon the statute, and in that case Mr. Justice BAYLEY said, "The plea does not allege generally, as a question for the jury, that this society was prejudicial to the public at large." There was no pretence for saying that the statute applied to the present case. The only question therefore was, whether the company was illegal at common law. That depended on the meaning of a dictum of Lord C. J. ABBOTT, in *Josephs v. Pebrer*, 3 B. & C. 644, "that trafficking in these shares may very possibly have been illegal at common law, inasmuch as it was bargaining and wagering about an act of Parliament to be obtained in future." That point

did not arise in the present case at all. The pleas
 * 45 stated, that * the company intended to act as a corpora-
 tion without the charter of the King, but they did not
 say any thing about an act of Parliament. If the intention
 to share the profits was to be held illegal, then there was no
 public undertaking that was not so, and every public company
 at its first formation would be under the necessity, on the
 other hand, of acting illegally, or, on the other, of violating
 a rule of their Lordships' House, which declared that a
 certain number of shares must be subscribed for before any
 company should be permitted to apply for an act of Parlia-
 ment. Yet it was manifest that no shares would be sub-
 scribed for till the terms of dividing the profits had been
 made one of the consequences of creating the shares. There
 was not enough in these pleas to show that the undertaking,
 or the formation of the company, was so illegal as to prevent
 the plaintiff from recovering.

Mr. Lloyd, for the defendants in error, was not called upon
 to argue.

Judgment. Tuesday, July 8.

LORD TENDERDEN. — It appears to my judgment that this
 case is so plain that it will not be necessary for your Lord-
 ships to hear any further argument upon it; and I am the
 more satisfied with my own opinion, as all the Judges who
 are now present agree in that opinion. They all agree that
 the judgments of the Courts below ought to be affirmed.
 Your Lordships happen to enjoy this advantage, that six or
 seven Judges are now present, not one of whom was a Judge
 of either of the Courts below when the judgments appealed
 from were given, and consequently are not influenced by their
 previous opinions. This is an action of debt on bond, to
 which the defendant has pleaded three pleas, which,
 * 46 after argument on demurrer * in the Court of Common
 Pleas, and after writ of error in the Court of King's
 Bench, both Courts held sufficient to bar the action. His
 Lordship stated the nature of the patent, and of the condition
 thereto annexed. The condition is large, and is expressed in

such a manner as to embrace almost every case that could be put of an assignment to any number of persons exceeding the number of five: "if the patentee or his agent should receive any sum of money from any number of persons exceeding five, for the purpose of dividing with them the benefits" of the patent, then it should be void. The plaintiff only set forth the obligatory part of the bond, not the condition; the defendant stated the condition; and it is to this effect, that the plaintiff shall procure 9000 subscribers to form a company, to whom the defendant and two other persons shall part with the business they were then carrying on under the patent. It is, therefore, clear that, on the condition of the bond, this plaintiff was not entitled to any money unless he formed a company, and procured 9000 shares to be taken, and unless he obtained payment of the first instalment. If the plaintiff, instead of confining himself to the statement of the obligatory part of the bond, had set out the condition of it, he would necessarily have shown a breach of the condition of the patent, and would have alleged enough in his own declaration to show that he could not maintain the action. But whether the matter comes before the Court on the plaintiff's declaration or on the defendant's plea, is a perfectly nugatory distinction. The fifth and sixth pleas aver the intention of the parties to vest the interest in more than five persons; the seventh plea introduces something else, and alleges that it was intended, at the time of making the bond, that the company * should consist of more than * 47 five persons; that they should act as a corporate body, and divide the benefit of the letters-patent. The supposed illegality is put, therefore, on two grounds, first, that taken on the fifth and sixth pleas, that more than five persons were to form the company; and, secondly, that it was intended that the company should act as a corporate body. It is not necessary that both parts of the pleas should be proved. It is sufficient if either part is made out. If any one of the pleas is good, the judgment of the Court below must be affirmed. The condition of the letters-patent is what I have mentioned; and the recital of the object of the bond is such, that the plaintiff cannot be entitled to the money he claims

unless he had done that which is contrary to the condition of the letters-patent, that is, unless he has obtained a greater number than five persons to become members of this company, and unless he has procured them to pay the first instalment on their shares. If they did pay that instalment, they would pay it for nothing, for they could not have the benefit of the patent. The object of the instrument on which the plaintiff seeks to recover was to invite the world to pay money for something from which they could not derive any advantage. But it is said that it is not shown the plaintiff knew this to be the condition of the letters-patent. I will not put the answer to that argument on the ground that every man must be presumed to know the effect of the instrument which he undertakes to carry into execution. If he was ignorant, it was his own fault; if he did not know, he ought to have known; but the fraud upon the public would be equal whether he did or not know that he was inviting men to do something which was illegal. The question then

comes to this — can a man have the benefit of a bond * 48 by the condition of which *he undertakes to violate the law? It seems to me that it would not be according to the principles of the law of England, which is a law of reason and justice, to allow a man to maintain an action under such circumstances; it would be to hold out an encouragement to any man to induce others to become dupes, and to pay their money for that from which they could derive no advantage. Under these circumstances, I shall humbly advise your Lordships that the judgment of the Court below should be affirmed.

Judgment affirmed.

LORD TENTERDEN. — My Lords, after the unanimous opinions of two Courts below have been given against the plaintiff, the bringing a writ of error here is a persevering in an attempt to obtain from this House something which eight Judges have held him not entitled to obtain. Under such circumstances, it appears to me that justice requires that the judgment should be affirmed, with 80% costs, which is proba-

bly somewhat less than the expense that the defendant in error has been compelled to incur.”¹

Judgment affirmed accordingly.

* APPEAL

* 49

FROM THE ROLLS COURT.

NICOL v. VAUGHAN. (a)

1832.

NICOL *Appellants.*
VAUGHAN *Respondent.*²

Judgment.

Two ladies entrusted much of the management of their affairs to A., who was not a professional person. In the course of business A. became bound with them in a bond for 10,000*l.*, given on their account; on the same day, they executed a bond to A. for 12,000*l.* The survivor of the two ladies afterwards, by her will, left a legacy of 2000*l.* to A. The bond for 12,000*l.* was, on the face of it, a simple money bond. Held, that it must be taken to be a simple money bond, unless impeached by evidence which showed that it was partly for indemnity; and that the burden of proving it to be an indemnity bond lay on the party impeaching the bond.³

July 23.

THE LORD CHANCELLOR. — My Lords, this case is an appeal from the judgment of the Master of the Rolls, arising out of a former appeal, in which your Lordships were pleased to reverse the order of his Honor, directing certain issues to be

(a) As the facts of this case have been already fully given (see 2 Dow & Cl. 420),⁴ it has been deemed unnecessary to repeat them here.

¹ See *Solarte v. Palmer*, 2 Cl. & Fin. 100.

² S. C., 6 Bligh N. S. 104.

³ See 2 Dan. Ch. Pr. (4th Am. ed.) 850, 851.

⁴ S. C., 5 Bligh N. S. 505.

tried, and to remit the case back to his Honor, to consider the question upon the evidence as it then stood before him.¹ The matter for the decision of your Lordships now is that which was not then disposed of, but sent back to his Honor for his consideration, namely, whether or not, upon the evi-

dence before him, this bond given by the Ladies Ker to * 50 the late Mr. Nicol, was to be considered as * a bond of indemnity to the extent of 10,000*l.*, and as a voluntary bond, either voluntary or for services performed, to the extent of the remaining 2000*l.*, or whether it was not a simple bond to the extent of 12,000*l.* given by those ladies, as the obligors of the bond, to Mr. George Nicol, as the obligee. His Honor, upon the question and upon consideration of the evidence then in the cause, has come to the conclusion, that it was a bond of indemnity to the extent of 10,000*l.*, and to the extent of 2000*l.* it was a voluntary bond, given to Mr. Nicol by these ladies: and the opinion which I certainly have formed, and which my noble and learned friend, (a) whose assistance we had on the former occasion when this was argued, also formed, is, that this bond is not to be considered as a bond of indemnity for any part of the amount at all. That opinion has not been shaken by the further consideration of the question, or by the learned and able arguments which were adduced at the bar on the part of the respondents.

My Lords, this bond, upon the face of it, is a money bond for 12,000*l.* and interest; on the face of it, it is clear and

(a) Lord LYNTHURST.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1077, 1082. For a statement of the practice in England and in the United States, with regard to the trial of questions of fact arising in equity suits, see 2 Dan. Ch. Pr. (4th Am. ed.) 1071 *et seq.*, and notes. For reference to American cases, in which the right of parties to have such questions tried by jury has been considered, see 2 Dan. Ch. Pr. (4th Am. ed.) 1075, note (10); *Shaw v. Norfolk County Railroad Co.*, 16 Gray, 409; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 47-49. Respecting the right of appeal from orders directing or refusing issues, see 2 Dan. Ch. Pr. (4th Am. ed.) 1075, 1076, note (1); *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Wright v. Wright*, 13 Allen, 207; *Brooks v. Tarbell*, 103 Mass. 496, 499; *Beverly v. Walden*, 20 Gratt. 147; *Wise v. Lamb*, 9 Gratt. 294; *Stanard v. Graves*, 2 Call, 369.

plain, and therefore the proof lies on the respondents in this case, and it is for them to satisfy your Lordships that it was not what it purports to be. There being no one word of indemnity, nothing pointing towards indemnity, nothing connected with indemnity, appearing on the face of the instrument, it was for them to show, by sufficient evidence travelling out of the instrument, that the purpose for which it appears to have been granted was not the real purpose, and that it was intended only to the extent, at least, of 10,000*l.* of the 12,000*l.* to cover Mr. Nicol's liability, which he had incurred in the transaction with Messrs.

* Coutts, and to which those ladies, the obligors in the * 51 bond, were parties. Now the evidence which was adduced before his Honor, and the only evidence before your Lordships when we came to consider it, altogether exclusive of Mr. Nicol's own examination, is, in fact, the date of the bond being identical with the date of another bond executed by those ladies to Mr. Coutts, and in which Mr. Nicol joined them, and became also their surety to Mr. Coutts, and which was for 10,000*l.*, executed on the same day with the bond in question. This of itself, this mere coincidence of date, is clearly insufficient; and as to the sum being the same, I still hesitate, and more hesitate now than I did before, in saying that the two instruments were for the same sum. The one is for 12,000*l.* and the other for 10,000*l.*; and you only can make it out that they are for the same sum by deducting the 2000*l.*, and saying that 10,000*l.* of the 12,000*l.* is to be taken as the same sum as that in the bond which Mr. Nicol joined in with the ladies to Mr. Coutts, and to that extent, therefore, the sums are identical, and the one is intended as an indemnity against the liability incurred by Mr. Nicol to Mr. Coutts by the other. But it is to be considered that the giving of a bond for 10,000*l.* is not an indemnity to a party who joins with you in a bond for that amount to another, because there are costs (there is nothing for that in this bond), there are the costs which you may incur in consequence of that transaction, and against that the 10,000*l.* bond does not give security. Why, then, the argument in answer to that, the pressure of that being felt on the part of the

respondents, is this: "true, the 10,000*l.*, for that reason, is not sufficient for the costs, which are to be taken into the account,

but then the 2000*l.* over the 10,000*l.* was added for
* 52 the express * purpose of covering the costs." Not to

say that this is most gratuitous, that it is an assumption made to suit the purpose of the argument, it is negatived both by the finding of the learned Judge in the Court below, in the decree appealed from, and by the argument of the parties themselves (the respondents). It is negatived by the finding in the decree; for that says that the bond was intended, to the extent of 10,000*l.*, as a counter-security for the engagement into which he had entered as surety for Lady Essex and Lady Mary Ker in the bond for 10,000*l.*, executed by those ladies to Mr. Coutts, bearing date the 15th day of July, 1815; and as to the 2000*l.*, that was intended as a voluntary gift, as a remuneration for his services. Now there is not in that decree a word about the 2000*l.* being to cover costs, but it expressly declares that the 10,000*l.* was indemnity, and the 2000*l.* was a voluntary gift for services by him performed. It is equally negatived by the argument of the respondents themselves, who, so far from taking that view which I am now referring to, of the 2000*l.* being added to cover costs, contended, in their original case, that Lady Essex Ker, in August, 1819, made and published her will, and intending to confirm the gift of 2000*l.* secured by the bond for 12,000*l.*, she gave a legacy of 2000*l.* to Mr. Nicol. So far from then saying, as they now contend, that the 2000*l.* was added to the 10,000*l.* to cover the costs and to make the whole an indemnity, they there, in precise accordance with the declaration in the decree appealed from, contend that the 10,000*l.* was indemnity, and the 2000*l.* was gift. Now, my Lords, when this question arose, it being quite clear that the proof was upon the respondents, an application was made for leave to examine Mr. George Nicol himself, and he was examined

* 53 * upon interrogatories presented by the respondents. It was also stated in the order, that it was by consent of parties that Mr. Nicol was to be entitled to frame interrogatories for his own examination; he was, however, examined on this subject on the part of the respondents, and they appear to

have moved in that examination; but whether they did or not is immaterial for my purpose; they certainly professed, and professed in the course of the argument here, that they were desirous of examining him themselves, in order to sift the matter to the bottom. Well, then, can they, after having elected to examine him themselves — can they, when his examination is taken, turn round and call upon your Lordships, as they appear to have called upon the learned Judge in the Court below, to throw that examination of Mr. Nicol entirely out of the cause, and to decide as if he never had been examined, and therefore in their favour; though if he never had been examined the matter would have stood as it did, for the correspondence proves nothing one way or the other. If the examination had not been taken, the cause must have been decided against the respondents, that the bond was in no degree an indemnity. Can they now call upon your Lordships to dismiss Mr. Nicol's examination altogether, and to decide, either as if it were not in the cause, and therefore to decide for them; or to decide as if, being in the cause, the result of the examination had proved favourable to them. He completely negatives indemnity from the beginning to the end of his long examination; he denies that there was any such view taken of the matter; he states that the ladies knew perfectly well the whole transaction in which they were engaged; he states that the bond was given, not as a counter-security, in no respect as a counter-security, but was given partly from kindness *and partly from * 54 gratitude towards him, and in part, though apparently in a small part, in respect of an account of moneys advanced by him to them, and which they owed him at the time they executed that bond to him for the sum of 12,000*l*. I take it, therefore, in this case, which really admits of no doubt, that we must consider this bond as a simple money bond, the proof being thrown upon those who impeach it, and who are to prove it indemnity, that we must take it that they have failed in that proof, and that the case remains as it did before this gentleman, Mr. Nicol, was examined. There is nothing whatever that differs this from the ordinary case of a 12,000*l*. bond. It is not contended, as I apprehend, that there was

any fraud on the part of Mr. Nicol. In truth, it is impossible to ascribe fraud to that gentleman in this transaction. There was no concealment. It is true that he made no use of the bond during the lifetime of those ladies; and from obvious motives of delicacy, and from an understanding between them, it is quite clear that he was not likely to have done so. After the death of the survivor, Lady Essex Ker, however, he very soon after uses the bond, by depositing it with Mr. Coutts; that gentleman being the person who, if there had been any fraud in the transaction, was most likely to be cognizant of that fraud. He did not wait till Mr. Coutts, who was a very old man, died, but during the lifetime of Mr. Coutts he used the bond, by depositing it with him; and what I am about to observe also is most material; he obtained, upon the deposit of that bond, from Mr. Coutts, who must have known all the transaction, he obtained, not 2000*l.*, but he obtained an advance of 3000*l.* With respect to fraud, the observation stares one in the face, and indeed the only

suspicious part of the transaction, except one that I am

* 55 * about presently to allude to; the only circumstance that can raise any suspicion of its being indemnity is the identity of the dates of the two bonds; and the easiest thing in the world, on Mr. Nicol's part, would have been to have avoided the possibility of any inference being drawn from that fact by avoiding the fact itself, and having the one bond executed upon a day somewhat distant from the other. Instead of that, he has them both executed on the same day, and for a reason which he explains in his examination, that the ladies with great difficulty could be got to attend to business, and particularly business of that description, law business; and therefore it was more convenient that both transactions should take place at one and the same time. A legacy was left by Lady Essex Ker to the amount of 2000*l.*, she having survived her sister, I think, a year and a half; and it was left him for his services: in so many words, for the services rendered by him to her, stating it generally, for his services, without stating what they were. Now she survived her sister somewhere about a year and a half, and no reference is made there to the 2000*l.* before, and which there

would have been on the supposition that the 2000*l.* was gift, and the 10,000*l.* was indemnity. I cannot help thinking too, that her leaving 2000*l.* without any reference to what had passed before, it not being pretended that she was not in perfect possession of her faculties at the time she made her will, it not being pretended that she did not know the whole earlier transaction, and understood it at the time she entered into it, I think that that 2000*l.*, being left for his services, without any reference to it, can be accounted for in no other way than on the supposition of her thinking that by that 12,000*l.* he had been too little paid, and that he, having continued * the same friendly assistance to her after the * 56 death of her sister, Lady Mary, had entitled himself to a further testimony of her gratitude at her hands. My Lords, there was some reference made in the course of the argument to the case of *Huguenin v. Baseley*, 14th Vesey;¹ and *Lord Selsey v. Rhoades*, 2d Simons and Stuart. The latter of those cases, *Lord Selsey v. Rhoades*, was before the same learned Judge who decided this case in the Court below; and the former case, it is well known, was decided many years ago by Lord ELDON. I really can find no bearing of these cases upon the present. That of *Huguenin v. Baseley* was clearly put upon fraud and misrepresentation; and Lord ELDON, in his judgment, admits, that if the deeds had been pure, voluntary, and well-understood acts of the mind of the party, the Court would not set them aside. If, however, they are not the pure and well-understood acts of the mind of the party, then, said his Lordship, the Court will set them aside; and he put it on the ground that Mrs. Huguenin did not understand the instruments she was executing, and that the defendant did not give her the information he was bound to give her before he suffered her to execute those deeds. In *Lord Selsey v. Rhoades*, his Honor there lays it down, and most correctly, that there is no rule of law to prevent a steward (it was the case of a steward having obtained a beneficial lease from his employer), he says there is no rule of law to prevent a steward receiving a beneficial lease from his employer, but he must show that he gave the full consideration

¹ P. 273 (Sumner's ed.), note (a).

which it would have been his duty to take from a stranger ; and if as a testimony of bounty of his employer, he is bound to make out that his employer had all the knowledge from * 57 him which he, the steward, had as to the value of * the lease, and the other circumstances necessary for him to know, such as the extent of the term, and the extent of the bounty which he was bestowing upon him by granting him that lease. Now upon those propositions there can be no pretence whatever to entertain the slightest doubt ; no one can entertain any doubt whatever upon them ; but they do not appear to me to bear upon the present case. One or both of those cases are meant to be cited for the purpose of showing that the proof is not on the party seeking to set aside the bond, but that the proof of its not being an indemnity is upon the party setting up the bond ; upon that I am clearly of opinion, that there is nothing to be found within the four corners of either of those cases which at all goes to establish so extravagant a proposition. Where the bond on the face of it is clear and plain, and purports to be for 12,000*l.* in money, it is for those who seek to set aside that bond, it is for those who seek to construe it in a different way, and to read it as if it were not what it purports to be, but something else, it is for them to show your Lordships, by sufficient evidence, and not by surmise or conjecture, or merely endeavouring to raise a suspicion, that it is in reality a transaction different from what on its face it appears to be. My Lords, I stated that there was one circumstance in this case, but for which, I conceive, there never could have existed a moment's doubt respecting this transaction, and that is, that it was unfortunately not prepared by the man of business usually employed by Ladies Essex and Mary Ker. They do not appear at that time to have had a professional man regularly in their employ. A respectable gentleman of the name of Moore appears to have been engaged by them in some law concerns formerly, but he does not seem to have been by them regularly * 58 employed * as their professional agent. It is unfortunate that there was not a professional man employed by them regularly, and who, if there had been such a one, ought undoubtedly to have been the person employed in preference

to Mr. Nicol's solicitors. Mr. Nicol employed them to prepare it; and but for that circumstance I really think there never could have been, from beginning to end, the least doubt or suspicion entertained of this transaction. But I am very far from saying that is a circumstance that ought to weigh in your Lordships' minds in the opinion which you are to form upon it. The peculiarities in the habits of the parties, the very close intimacy that prevailed between them and Mr. Nicol, and the fact of their not having regularly employed a professional man at that time, will, in all probability, be sufficient to account for that difficulty, the only one which I can perceive in this transaction. My Lords, upon the whole, therefore, I was of opinion, that it was impossible formerly to call upon your Lordships to sanction the inference raised from this coincidence of date; but we then had before us only the question of, whether or not those issues should be tried? we had not the question, what conclusion ought to be drawn by his Honor, he having at that time drawn no conclusion, but sent it to be tried by a jury. I am of the same opinion now, on further consideration and fuller argument, that I entertained at that time, namely, that this bond is to be taken as the Master took it, and that the exception taken by the respondents to the Master's report ought to have been overruled by his Honor, and that accordingly this House should reverse so much of the decree appealed from as declares the bond for 12,000*l.*, executed by the Ladies Essex and Mary Ker, bearing date the 15th day of July, 1815, was intended, to the extent of 10,000*l.*, as * a counter-security, for the * 59 engagement into which he had entered as surety for the Ladies Essex and Mary Ker in the bond for 10,000*l.* executed by the same ladies on the same day (the 15th of July, 1815); and so far also as the same decree ordered, that the sum of 5*l.* deposited with the Registrar on setting down the exceptions to be heard, should be returned to the respondent, Sir Robert William Vaughan; and also so far as the decree ordered, that it should be referred back to the Master, to review his report, according to the declaration; that so far as that goes the decree appealed from should be reversed; and that the report of the Master of the 21st day of March, 1828,

should be directed to be absolutely confirmed. My Lords, I stated when this question was argued, regarding my noble and learned friend, (a) the benefit of whose assistance we had on the former argument, on the appeal respecting the trial of the issues, he having attended at that time, and paid great attention to it, that it would be satisfactory to me to have the benefit of his opinion upon this matter before your Lordships finally decided it; I have communicated with him upon it: he has reconsidered the case very fully, and he remains entirely of the opinion which I expressed, as far as it was necessary to be expressed, on the former occasion, and which he, as far as his observations then went, confirmed; and he is now clearly of opinion, upon the evidence as it now stands, that the judgment of the Court below, so far as I have stated, is wrong, and therefore to that extent ought to be reversed.

Judgment of the Court below reversed accordingly.

COCKERELL AND OTHERS v. CHOLMELEY.

1832.

Sir CHARLES COCKERELL, Bart., HENRY TRAIL,	} <i>Appellants.</i>
Sir CHARLES RICHARD BLUNT, Bart., The	
Most Noble GEORGE Duke of Marlborough,	
and JAMES BLACKSTONE	
FRANCIS CHOLMELEY	<i>Respondent.</i> ¹

A testator, by his will, devised his lands to trustees, with a power of sale. The trustees sold the estate, but as it was supposed that the tenant for life, without impeachment of waste, was entitled to the produce of the growing timber, the deed for carrying the contract of sale into effect recited that the trustees had sold the lands for a certain sum, and that

(a) Lord LYNDBURST.

¹ S. C., 1 R. & My. 418.

the tenant for life had sold the timber then standing thereon for a certain other sum. The purchase money of the estate was paid to the trustees, and invested according to the directions in the will; the value of the timber was paid to the tenant for life. *Held*, that this was a bad execution of the power, and that it was not cured by the subsequent investment by the tenant for life, according to the directions in the will, of the money which, under a mistake of the law, had been thus paid over to him.¹

SIR HENRY ENGLEFIELD, late of the parish of Sonning, in the county of Berks, Bart., being seised of the manor of Early, and the manor, mansion-house, and lands of White Knights, in that county, made his last will and testament in writing, dated the 27th of November, 1778, and executed so as to convey real estates, and, amongst other things, devised the said manor of Early, and his manor and mansion-house * called White Knights, and all and every his messu- * 61
ages, lands, &c., in the county of Berks, unto the Right Honourable Charles Sloane, Lord Cadogan, and Sir Charles Bucke, Bart., and their heirs, upon trust to secure to his widow an annuity of 500*l.* per annum, then to the use of the testator's eldest son, Henry Charles Englefield, for and during the term of his natural life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, created in favour of Francis Michael Englefield, the testator's second son, and of Teresa Anne Englefield, his daughter. And the said testator declared his will to be, that notwithstanding any of the estates and uses by his said will created or limited, it should be lawful to and for the said Lord Cadogan and Sir Charles Bucke, or the survivor, from time to time, at the request and by the direction or appointment of the person who, for the time being, should be in possession of

¹ See *Waldo v. Waldo*, 12 Sim. 107; *Cholmeley v. Paxton*, 3 Bing. 207; 5 Bing. 48; 10 B. & C. 564; 3 Russ. 565; *Lewin Trusts* (5th Eng. ed.), 320; *Perry Trusts*, §§ 774, 776; *Kekewich v. Marker*, 2 Mac. & G. 311, 330-332. But now Courts of Equity in England have power to give validity to such sales made by mistake, upon payment by the purchaser of the value of the timber and interest for the benefit of the settlement. And this extends to a case where a tenant for life has by mistake been allowed to receive out of the purchase-money the value of any other articles attached to the estate. 1 Sugden V. & P. (8th Am. ed.) 71, 72, 112; 22 & 23 Vict. c. 35, § 13.

or entitled to the rents and profits of the manor and tenements aforesaid, signified by any deed or writing under seal, attested by two witnesses, to sell, or to convey in exchange for other manors, lands, &c., all or any part or parts of the manor and tenements aforesaid, to any person or persons whomsoever, either together or in parcels, for such price in money, or any other equivalent, as to them should seem just and reasonable; and to that end for the said Lord Cadogan and Sir Charles Bucke, or the survivor, by any deed under their hands and seals, to declare such new uses as should be necessary for the executing such sales or exchanges; and when any of the said premises should be sold for a valuable consideration in money, in pursuance of the powers thereby given, all the sums of money which should arise by such sales should be laid out by the said Lord Cadogan and Sir

* 62 Charles * Bucke, or the survivor, with such consent as aforesaid, testified as aforesaid, and be invested in the purchase of other freehold manors of inheritance, in fee simple, in possession, and of copyhold lands of inheritance, if any should be intermixed therewith, to be settled and conveyed to the same uses as were thereinbefore limited.

The testator died on the 1st of June, 1780, without revoking or altering his will; Dame Katherine Englefield and all his three children survived him: upon his death his eldest son, Henry Charles Englefield, who thereupon became Sir Henry Charles Englefield, Bart., entered into the possession of the manor, mansion-house, and lands of White Knights, as tenant for life, under the limitations of his father's will.

On the 1st January, 1782, Sir Charles Bucke died, and Lord Cadogan became the sole trustee under the will.

In the same year, Teresa Anne Englefield intermarried with Francis Cholmeley, late of Bransby, in the county of York, Esq., deceased, and the respondent, Francis Cholmeley, was the eldest son of that marriage, and was born some time in the year 1783.

In the month of July, 1782, William Byam Martin, Esq., being desirous of purchasing the manor and mansion-house and lands of White Knights, employed the late Mr. Cockerell, then of Stratton Street, an architect and surveyor, to make

inquiries about the property, and to treat for the purchase of it. Mr. Cockerell accordingly applied to the London attorney and solicitor, and the country attorney and solicitor of the Englefield family, for permission to view the house and grounds, and for information respecting the particulars of the property, and the price for which it was to be *sold, * 63 and having viewed the property, and obtained such information as he was able, Mr. Cockerell, as the agent of Mr. Martin, finally made an offer, which the then tenant for life and the trustee agreed to accept.

The real contract between the parties being a contract for the sale and purchase of the manor, mansion-house, and lands of White Knights, with the addition of lands called Foxholes, at the price of 13,400*l.*, and of the timber and other trees thereon at a price to be fixed by the valuation of two surveyors, the point now in dispute was, whether the respective parties and their law advisers in carrying this contract into effect had not committed a mistake. They conceived that, inasmuch as Sir Henry Charles Englefield was entitled, as tenant for life, without impeachment of waste, to cut down the timber and other trees upon the property contracted to be sold, and to sell the same when cut, and to receive for his own use the proceeds of such sale, he was therefore entitled to the value of the said timber and trees although left standing; and upon this mistake as to the rights of Sir Henry Charles Englefield as such tenant for life, the deed for carrying the above-mentioned contract into effect was framed.

That deed, instead of reciting the contract of the parties as one entire contract, contained a recital to the following effect: "Whereas, the said Lord Cadogan, by virtue of the power given to him in the will (and at the request of Sir H. C. Englefield, properly testified), contracted with the said William Byam Martin for the sale of the manor and of the mansion-house of White Knights, and of the outhouses, &c., and of the fixtures and furniture, &c., for the sum of 13,400*l.*; and the said Sir H. C. Englefield, who, as tenant for life, without impeachment of waste, is *entitled to the * 64 timber trees standing and growing and being on the said premises, so agreed to be sold to the said William Byam

Martin, hath agreed to sell the said timber and timber trees to the said W. B. Martin, at or for the sum of 2448*l*."

The sum of 2448*l*. was paid to Sir Henry Charles Englefield, for his own use, and the sum of 13,400*l*. only was paid to and received by Lord Cadogan, as the surviving trustee under the will. The deed was duly executed by all parties, and Mr. Martin entered into possession of the property.

Part of the sum of 13,400*l*. was laid out by Lord Cadogan upon mortgage security, and the residue was invested in the purchase of three per cent consolidated bank annuities, and proper deeds were executed by Lord Cadogan, declaring the trusts upon which he held the said trust funds.

Francis Michael Englefield died in the year 1789.

In the month of April, 1799, the sum of 13,400*l*. stood invested and secured in the following manner, that is to say: the sum of 12,500*l*., part thereof, upon mortgage of certain estates at Redgemont and Seekling, in Holderness, in the county of York, and the residue thereof, together with the proceeds of other parts of the estates devised by the said will, and sold under the said power, was invested in the sum of 4080*l*. 11*s*. 11*d*., three per cent consolidated bank annuities, and then stood in the name of Lord Cadogan in the books of the governor and company of the Bank of England.

Part of the said sum of 4080*l*. 11*s*. 11*d*. was, on the 1st of May, 1799, applied by Lord Cadogan, with the consent of Sir Henry Charles Englefield, in redeeming the land-tax charged upon and payable out of other parts of the

* 65 estates devised by the said will, * and the sum of 4080*l*. 11*s*. 11*d*., three per cent consolidated bank annuities, was thereby reduced to the sum of 601*l*. 10*s*. 9*d*. like annuities.

The respondent Francis Cholmeley attained twenty-one in the year 1804.

Dame Katharine Englefield died in May, 1805.

In the year 1806, doubts were suggested by Mr. Nowell, the solicitor of Sir Henry Charles Englefield, whether, inasmuch as the timber and other trees expressed to be conveyed by the deed of 12th of May, 1783, had not been severed from the land at the date of the execution of that deed, the sum

of 2448*l.* had been properly received by him ; and whether he ought to retain the same ; and in order to obviate any litigation, which might thereafter arise by reason of such doubts, Sir Henry Charles Englefield, on the 29th of July, 1806, purchased, and transferred into the name of Lord Cadogan, the sum of 3681*l.* 4*s.* three per cent consolidated bank annuities, being such an amount of that stock as the sum of 2448*l.* would have produced on the 17th day of May, 1783 ; by this transfer the amount of three per cent consols, in the name of Lord Cadogan, was increased to the sum of 4282*l.* 14*s.* 9*d.*

About the same time a draft of a deed-poll or declaration of trust was prepared, by the directions of Sir Henry Charles Englefield, and was intended to have been executed by Lord Cadogan, for the purpose of explaining how the said sum of 4282*l.* 14*s.* 9*d.* three per cent consols had been produced, and of declaring the trusts upon which the said Lord Cadogan held the same. This draft was submitted to the perusal of Lord Cadogan's solicitor, and was approved by him on his lordship's behalf ; but before the deed * was actually * 66 executed, and in the early part of the year 1807, Lord Cadogan died.

Teresa Anne Cholmeley, the mother of the respondent Francis Cholmeley, died in the year 1810.

The said manor, &c., by divers mesne conveyances, became vested in the appellants.

In consequence of the death of Lord Cadogan, and the lunacy of his heir-at-law, it became necessary to obtain an act of Parliament for the appointment of trustees for the discharge of the trusts of the will, and accordingly, in May, 1819, Sir H. C. Englefield, the tenant for life in possession, and the respondent Francis Cholmeley, the next immediate remainder-man in tail under the will of the said testator, Sir Henry Englefield, petitioned for leave to bring in a bill for the purpose of appointing new trustees of the said will ; and an act of Parliament was passed, whereby, after reciting the will of Sir Henry Englefield, and the sale of the said manor, mansion-house, and lands of White Knights, in pursuance of the trusts thereof, all the estates devised by the will, except

such as had been sold, were vested in William Cruise and Edward Jerningham, both of Lincoln's Inn, esquires, and their heirs, upon the trusts of the said will; and the executors of Lord Cadogan were empowered and directed to assign and transfer unto and into the names of William Cruise and Edward Jerningham, the sum of 12,500*l.* secured on mortgage, and also the sum of 4282*l.* 14*s.* 9*d.* three per cent consolidated bank annuities, then standing in the name of the said Lord Cadogan, to be held by them upon such of the trusts of the will as were then subsisting.

By a decree of the Court of Chancery made in a cause * 67 depending there, wherein some of the appellants * were plaintiffs, and others were defendants, dated the 6th of April, 1821, it was ordered and decreed that the said manor, mansion-house, and premises should be sold, with the approbation of one of the Masters of the said Court, and with the usual directions for that purpose; and in pursuance of the said decree, the said manor, mansion-house, and premises were, on the 16th of July, 1822, put up to sale by public auction, before the said Master, and the appellant, Sir Charles Richard Blunt, was allowed and reported by the said Master as the highest bidder for, and the purchaser of, the said manor, mansion-house, and premises, at the price of 37,000*l.*, and upon the terms contained in the conditions annexed to the particulars of sale. The report was confirmed by an order of the 6th November, 1822.

In the month of March, 1822, Sir Henry Charles Englefield died, and respondent thereupon became entitled, as the tenant in tail, to the possession of the hereditaments devised by Sir Henry Englefield's will, or to the proceeds of such of the said hereditaments as had been sold in pursuance of the said power of sale; and as such tenant in tail he presented a petition to the then Master of the Rolls, praying that William Cruise, the surviving trustee under the said act of Parliament, might be ordered to assign and transfer to him the sums of which he stood possessed under the trust; and that petition having been heard before the late Sir THOMAS PLOMER, on the 29th of July, 1822, his Honor ordered that it should be referred to one of the Masters, to inquire and state to the

Court whether the respondent was entitled to receive the said sums under the provisions of Lord ELDON's Act.

The Master reported that he was so * entitled; and the * 68 order for the transfer was accordingly made.

The respondent, Francis Cholmeley, as tenant in tail, commenced his action of formedon in the Court of Common Pleas at Westminster, in Michaelmas term, 1823, demanding against the appellants the said manor, mansion-house, and premises, and recovered judgment in such action, upon the ground that the deed of the 12th of May, 1783, was void at law, and that no estate or interest in the said manor, mansion, and premises, was thereby limited or appointed to the said William Byam Martin.

In Hilary term, 1826, the appellants exhibited their bill in Chancery, which was afterwards amended against the respondent, and, after stating the above facts, concluded by praying that it might be declared that the appellants were, under the circumstances, entitled to the benefit of the contract and agreement for the purchase of the said manor, mansion-house, and premises, and to have the said contract carried into effect, and to have the said indenture of the 12th day of May, 1783, reformed and amended, and made conformable to the said contract and agreement, and to have the said mistake and defect in the said last-mentioned deed rectified and made good, and that the respondent Francis Cholmeley might be decreed to do and execute all necessary and requisite acts and deeds for confirming and establishing the appellants' title to the hereditaments and premises mentioned and comprised in, and intended or expressed to be limited and conveyed by, the said indenture of the 12th day of May, 1783, and for general relief.

To this bill the respondent put in his answer; and * thereby insisted that the execution of the power of * 69 sale, by the indenture of the 12th of May, 1783, was void at law; and that the appellants were not entitled to any relief in a Court of Equity against him, and were not entitled to have remedied, or made good, any defect in the manner in which the sale to Mr. Martin had been carried into effect.

The cause came on to be heard before his Honor the Master

of the Rolls on the 17th of March, 1830, when his Honor decreed that the appellants' bill should be dismissed.

From this decree the appellants appealed, alleging that it was a settled rule in Courts of Equity that they would supply defects in executions of powers where a valuable consideration had been paid, and where the intention of the parties had been to execute the power, and they had been mistaken only in points of form. They insisted that that rule was fairly applicable to this case, where, from the beginning, there had been no other intention than that of a *bond fide* execution of the power by all the parties concerned in the sale of the estates. They further contended, that if there had been any irregularity in the execution of the power, it was removed by the subsequent transfer of stock made by Sir H. C. Englefield, so that no pretence existed for saying that the remainderman had suffered any injury. On the other hand, they insisted that the parties who had for such a length of time been acting upon the sale in 1783, in the belief that it was a good and valid sale, who had, besides, expended large sums of money in the improvement of the estate, would be unjustly deprived of the benefit of what they had done if that sale should now be set aside.

The respondent insisted that the construction of the power must be the same in a Court of Equity as in a * 70 * Court of Law, and in the latter the power had already been declared to be badly executed. A Court of Equity would only interfere to supply deficiencies, or correct mistakes in point of form; but here the substance of the power had been disregarded in its execution, which was indeed contrary to the intention of the donor of the power.

Judgment. July 23.

THE LORD CHANCELLOR. — There is a very important case which I appointed to give judgment in to-day. It is a case of very great hardship, — it is the case of Cockerell and Cholmeley, which was argued some time ago. I stated at the time, that, being impressed by the hardship of that case, though I certainly felt that the decree of the Court below ought to be affirmed, I should postpone advising your Lord-

ships as to the manner in which it appeared to me it ought to be decided until I had an opportunity of again attentively looking carefully into it, in order to see if there was any possibility of discovering means, consistently with the decided cases, consistently with the facts of the case, and consistently with the undoubted law of the case, of coming to an opposite conclusion, which attempt on my part has been in vain; and I certainly now am prepared to advise your Lordships to affirm the decree below. My Lords, when I have said I entirely agree with his Honor (from whose judgment this is an appeal) in thinking that it is one of the hardest cases, as I have already intimated to your Lordships, taking it altogether, that I have ever seen, even upon that chapter of the law — the execution of powers — which is so fruitful at various times in cases of this description, it is fit that I should add (and it is only what I threw out at the hearing of the cause), that nothing can be more unjust than to throw any imputation * whatever, on the other hand, against * 71 the gentleman who has taken advantage of the law of the land as it is. He is not bound to forego that advantage; he is not only not bound to forego that advantage, but, unless he be a person to whom many thousands of pounds are a matter of no importance, as regards either his own interest or the interests of his family, it would be a piece of romantic folly, in my opinion, for him to forego that advantage which the law of the land has given him. My Lords, many who have no occasion for money for their families, either from having enough of it themselves or their families being well provided for, may afford to be generous to others — for it is pure generosity in the way to which I have referred — but no man is to be blamed for wanting the means to be thus generous. Is it possible to think of blaming any person, merely because he is not guilty of an act of romantic generosity? — an act which, in the circumstances of this respondent, Mr. Cholmeley, who is stated to be a gentleman with a family, would, in all probability, have been an act of folly disenti- tling him to praise, and probably subjecting him to censure. My Lords, in the circumstances of the case, nevertheless, I shall not recommend to your Lordships to make any order in respect to costs.

* WRIT OF ERROR.

GILES v. GROVER AND OTHERS.

1832.

DANIEL GILES, Esq., late Sheriff of } *Plaintiff in Error.*
 Hertfordshire }
 HARRY GROVER and JAMES POLLARD. *Defendants in Error.*

Where goods have been seized under a *fi. fa.*, but remain unsold in the hands of the sheriff, he shall sell them under a writ of extent in chief or in aid, tested after the seizure under the *fi. fa.*, and shall satisfy the Crown's debt without regard to the previous execution.

THIS was an issue directed by the Court of Exchequer, in Hilary term, 1824, with a view to determine whether the effects of Henry Fourdrinier and Thomas Nicholls, debtors of the defendants in error, were liable to seizure under an extent in aid issued at the suit of Grover and Pollard. The goods of Fourdrinier and Nicholls had already been seized by the sheriff under writs of *fi. facias*, and remained in his hands unsold when the extent in aid was issued. The question was, whether the execution under the writs of *fi. fa.* was an execution executed so as to change the property, and leave nothing for the extent to operate upon, or whether the property still remained so far in the debtors as to be liable to seizure under the extent.

The case was submitted to the consideration of the Judges, who, on the 25th May and 25th June, delivered their opinions. The House of Lords took time for further consideration; and, on the 11th July, Lord TENTERDEN and the
 * 73 Lord Chancellor (BROUGHAM) expressed * their concurrence with the opinion of the majority of the Judges.

MR. JUSTICE PATTESON. — In this case your Lordships have propounded two questions for the opinions of the Judges. 1st. A common person brings his action against another, and obtains judgment; issues a writ of *fi. facias* upon that judg-

ment, and delivers the writ to the sheriff, who, in execution thereof, seizes the goods of the defendant: while the goods remain in the sheriff's hands, and before he has sold them, a writ of extent in aid is issued against the same defendant, as debtor of a debtor of the Crown, tested after the seizure under the writ of *feri facias*, and is delivered to the said sheriff: shall this writ of extent be executed by the sheriff by extending the same goods, seizing them into the King's hands, and selling them to satisfy the Crown's debts, without regard to the writ of *feri facias* under which he had first seized them?

2d. All other things remaining the same, does it make any difference whether the writ of extent was in chief or in aid?

Upon the first question much difference of opinion has long existed, and there are conflicting decisions of the courts of law. Your Lordships therefore will not be surprised to find that the Judges have not been able to agree, and it has become my duty to state my opinion upon it. I apprehend that the answer to this question depends upon two points: first, whether the property in the goods is so altered by the seizure of the sheriff under the *feri facias* that the extent cannot take effect; and, secondly, whether the statute 33 H. 8, c. 39, s. 74, bars the right of the Crown. As to the first point: At common law the goods of the debtor were bound from the *teste* of a writ of *feri facias* at the *suit of a com- *74 mon person, as well as from the *teste* of the King's writ.

This, as to common persons, is altered by the statute 29 C. 2, c. 3, s. 16, since which they are bound only from the delivery of the writ of *feri facias* to the sheriff. The Crown, however, not being named in that statute, goods are still bound from the *teste* of the King's writ. But this binding, in the case both of the King and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt, 3 Lev. 191, *Phillips and Thompson*. (Per Lord HARDWICKE, 2 Eq. Cas. Abr. 381, *Lowthall v. Tomkins*; and per Lord ELLENBOROUGH, 4 East, 538, *Payne and Drewe*; and many other cases.) And even when made in market overt, in the

case of the King, it in no way affects the priority of conflicting writs. The rule as to priority between common persons always was, that the writ which was first delivered to the sheriff should be first executed, without regard to the *teste*; but between the King and a subject, that the King's writ, though delivered last, should be preferred first, on the ground expressed by Lord COKE, 9 Rep. 129, *b. Quick's Case*; "Quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet." And this also without regard to the *teste*. If, therefore, a writ of *feri facias* at the suit of a common person may be delivered to the sheriff, and, before any seizure made by him under that writ, a writ of extent at the suit of the King, tested after the delivery of the *feri facias*, be delivered to him, it is not doubted but that the sheriff would be bound to execute the writ of extent in preference to the *feri facias*. In the case, indeed, stated by your Lordships, the sheriff had already seized under the writ of *feri facias* before the writ of extent was delivered to him:

* 75 what, then, is the effect of that seizure? * If by it the writ of *feri facias* is executed, if the rights of the King and the subject no longer run together, if the property in the goods be taken out of the debtor, then the writ of extent is too late; it has nothing on which to operate. But if the seizure of the goods be but an inception of the execution, if the rights of the King and the subject are still conflicting, if the general property in the goods still remain in the debtor, then the maxim will still apply, and the King's right must be preferred. It is not pretended in any of the authorities, except in some supposed loose *dicta*, that by seizure of the goods any property therein is acquired by the creditor; so far is this from being the case, that when goods were seized by the sheriff under one writ (which had been last delivered), it was held that he might sell under the writ of another creditor, which had been first delivered, but under which he had not seized; 1 T. R. 729, *Hutchinson v. Johnston*; and see 7 Taunt. 56, *Jones v. Atherton*. Now if the seizure under a writ of *feri facias* executed the writ, if it changed that property, and vested it in the creditor, how came it that the sheriff, having seized under the second writ, was not compelled to

sell under that writ? It cannot be said that the reason was because the property was bound and altered by the delivery of the first writ, and therefore the goods could not be taken under the last, since it was held in 4 East, 532, *Payne v. Drewe*, that if the sheriff sell under the writ last delivered, the creditor whose writ was first delivered cannot follow the goods or their proceeds, though he has his remedy against the sheriff; and the same point had long before been determined in *Smallcomb v. Gross*, 1 Lord Raym. 251, 1 Salk. 320, and other cases. It seems to me to be clear from these cases, that the seizure of goods by the sheriff will not make any difference * as to the rights of creditors under conflicting * 76 writs, any more than the *teste* of the writs does, and will not vest any property whatever in the creditor under whose writ the seizure is made, in the cases of common persons; why, then, should it make any difference in the case of the Crown and a subject? It is true that in one report of the case of *Wilbraham v. Snow*, 1 Lev. 282, Lord C. J. KELYNCE is made to say, that "the property is altered from the owner and given to the party at whose suit;" but the reporter adds a *quære*, and the other reports of the same case do not mention this supposed dictum. Again, in one report of *Clerk v. Withers*, 2 Lord Raym. 1075, GOULD, Justice, is made to refer to this supposed dictum of Lord C. J. KELYNCE; but in another report of the same case, 6 Mad. 293, GOULD, J., is made to say only that Lord C. J. KELYNCE held in *Wilbraham v. Snow*, that the sheriff gained a general property by seizure; whereas the other Judges held that he gained a special property only; and POWYS, J., is made to say that the general property remained perhaps in abeyance; all which shows only the inaccuracy of the reporters or the doubtful grounds of the decision; and as a special property in the sheriff is quite sufficient ground to warrant the decision, no other ground beyond that can reasonably be taken to have been established.

That the general property in goods, even after seizure, remains in the debtor, is clear from this, that the debtor may, after seizure, by payment, suspend the sale and stay the execution, 2 Show. 87, *The King v. Bird*; and have back

his goods without any bill of sale or assignment from the sheriff or creditor. And again, that if the sheriff, after selling a sufficient quantity of goods seized to satisfy the debt, proceed to sell more, trover will lie against him * 77 at the suit of the debtor; but *if the property by seizure is taken out of the debtor, it must be so taken as to all the goods seized; and what has operated to restore it? Still it is said that by the seizure a special property vests in the sheriff, and that this is an alteration of property sufficient to protect the rights of the execution creditor, and to prevent the Crown from taking otherwise than subject to those rights. It is undoubtedly true that the sheriff does by the seizure acquire a special property in the goods; he may maintain trespass or trover for them; *Wilbraham v. Snow*, 2 Saund. 47; 1 Sid. 438; 1 Ventris, 52; 1 Keb. 282; 1 Mod. 80; 2 Keb. 518, S. C.; and see 2 Saund. 344, *Mildmay v. Smith*. He is answerable to the creditor if they be rescued, and he is bound to sell them; 2 Lord Raym. 1075, *Clerk v. Withers*; 6 Mod. 290; 11 Mod. 34; Salk. 322; Holt, 303, 646. S. C. But on full consideration it seems to me that this property vested in the sheriff by seizure is merely that which results from his being the appointed officer of the law, and to enable him to sell goods, and to raise the money, not that thereby the property is taken out of the debtor. The goods are in substance in *custodia legis*; the seizure made by the officer of the law is for the benefit of those who are by law entitled; it is made against the will of the debtor, and no property is transferred by any act of his to the sheriff. In this respect it differs from all cases of special property, and of charges on goods created by the debtor whilst he has the absolute dominion over the goods. It is conceded that the Crown cannot avoid an equitable mortgage; *Casberd v. Attorney-General*, 6 Price, 411; or the lien of a factor, *The King v. Lee*, 6 Price, 369; or of a wharfinger, *The King v. Humphrey*, 1 McClelland & Younge, 173; or a *bonâ fide* assignment in trust for creditors, *The King v. Watson*, * 78 Weston on Extents, * 115; or any other similar assignment or charge, because they are created when the debtor has legal power and authority to create them, and

attach upon the goods before the process of the Crown, and the Crown can only take the goods subject to such liabilities as the debtor has legally created. In the case, however, of a seizure by the sheriff, the debtor has created no liability, and the Crown has a right to say that the sheriff, whilst the goods are in his hands, holds them for the benefit of any one who may have a legal charge against them as the property of the debtor. One instance apparently showing that a *fiery facias* is executed by seizure of the goods, is that of the bankruptcy of the debtor after the seizure and before sale, in which the assignment of the commissioners does not pass the property in the goods to the assignees, although it relates back to the act of bankruptcy; and although the words of the statute, 21 Jac. 1, c. 19, § 9, respecting the distribution of bankrupts' effects, compel creditors, upon judgment, "whereof there is no execution or extent served and executed" upon the lands or goods before the bankruptcy, to come in *pari passu* with other creditors. And even a fraction of a day is made in favour of the *fiery facias*, *Thomas v. Desanges*, 2 B. & A. 586. It is argued, therefore, that the courts of law, by holding that seizure under an execution before an act of bankruptcy prevents the execution creditor from being driven to come in with the other creditors, have in effect held that by such seizure the execution is served and executed. Now it is to be observed, that at the time of the passing of the 21 Jac. 1, goods were bound from the *teste* of a *fiery facias* as against the debtor's own acts; and it seems not improbable that this provision of the statute might be intended to guard against creditors who might have sued out a writ, and

* so bound the debtor's goods, but still abstained from

* 79 putting it in force till after an act of bankruptcy; which would be in conformity to the principle of the subsequent sect. 11, as to goods in the possession of the bankrupt, by consent of the true owners. Besides, the goods when seized are the goods of the debtor, and if the effect of the seizure were to be done away with by a subsequent act of bankruptcy, it would enable the debtor, by his own act, to defeat the creditor. The Courts, therefore, have construed the words in that Act as applying to a seizure, not to a sale. At

all events, whether this conjecture be right or wrong, the decisions amount only to a construction of words in a particular Act of Parliament, with reference to the scope and object of the Act, and cannot effect the general law; and it is also to be remembered, that the Crown is not mentioned in or bound by that Act. The case of *Clerk v. Withers*, 2 Lord Raym. 1072, is also pressed as establishing the doctrine that the property is taken out of the debtor by the sheriff's seizure; but no such doctrine is there laid down. The facts of the case were shortly these: an administrator recovered a judgment by default against Clerk; he sued out a *fiery facias*, and Withers, the then sheriff, seized Clerk's goods; before sale the administrator died; then Clerk sued Withers (who had gone out of office in the mean time) to have restitution of his goods, contending, that as the plaintiff was an administrator, his executor or administrator could not have the benefit of the judgment, and that any new administrator, *de bonis non*, could not, because the judgment was by default. Another point was raised, which is not material here, as to Withers having quitted office: after much argument, it was held that the action would not lie, because Clerk was discharged from the debt by the seizure of the sheriff, *ad* * 80 *valentiam*, and * that the sheriff, having seized in the lifetime of the plaintiff must account to his representatives. All this is perfectly consistent with the position that the general property in the goods, even after seizure, remained in Clerk, and establishes only that the debtor himself cannot defeat an execution once begun, nor get back his goods after seizure under a *fiery facias* without payment of the debt.

It is urged also, that when goods are once seized under a *fiery facias*, the sheriff must go on to perfect the execution, and that even a writ of error will not operate as a supersedeas. The cases to establish this position are somewhat confused; but admitting it to be established, the doctrine of change of property does not follow, for the bringing the writ of error is here also the act of the debtor himself.

For these reasons, and on the authority of the cases I have mentioned, and some others to which I must refer hereafter,

I conceive that the property in the goods is not so altered by the seizure of the sheriff under the *fieri facias* as that the extent cannot take effect.

I come now to consider what is the effect of the Statute 33 Hen. 8, c. 89, § 74. Premising, that it appears to me somewhat doubtful whether that section applies to any writ of extent issued in the first instance, commonly called an immediate writ of extent, and whether it was not intended to apply only to the King's writs of execution, after judgment or reward of execution obtained by him in a suit, I am of opinion, that if it does apply to such an extent as at present, it does not, under the circumstances stated, prevent its priority. That statute created certain new Courts; and it must be admitted that it gave the King some new rights, for the 50th section gives to bonds made to the King the effect of statutes staple, and the 53d section gives the King * the same * 81 remedy on those bonds as the subject had had on statutes staple. Then, after various other matters, comes the 74th section, at a great distance, and it is this:—

“That if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit or process shall be preferred before the suit of any person or persons; and that our sovereign Lord the King, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons, so always that the King's said suit be taken or commenced, or process awarded for the said debt, at the suit of our said sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons.”

Now, in order to arrive at the true meaning of this clause, I think we must look at the state of the law before and at the time of the passing of the Act. At common law, the King might, by his writ of protection, prevent any subject from suing his debtor at all, until the King's debt was satisfied. Co. Litt. 131 *a*. By Statute 25 Ed. 3, c. 19, it was provided, that notwithstanding such writs of protection, the

subject-creditor might sue the debtor to judgment, but not have execution till the King's debt was satisfied; and if the creditor would undertake for the King's debt, he should then have execution both for it and his own. Such writs of protection have long since ceased; and Lord COKE says, that he cannot say any thing of them from his own experience, but there is no doubt that they were in use at the time of the passing 33 Hen. 8, that Act having, by the 50th section, made bond debts to the King binding on the land of the debtor from the date of the bond, which they were not before.

* 82 The 74th section seems to have been inserted * for the benefit of the subject, primarily with a view to land, and so as to prevent the King's bonds from binding the land as against the judgment of a subject, which also bound the land, unless the King, by putting his bond in force before such judgment obtained, had expressed his intention so to bind it. But the 74th section was also inserted, as it seems to me, with reference to the very prerogative of the King of preventing the execution of the subject, and so having first execution himself, restricted as it was by 25 Ed. 3, c. 19; and in this view it applies to all proceedings for recovery of the King's debts, and to executions against goods as well as lands; and it abridges the power of the Crown as it has been considered to do in *The Attorney-General v. Andrew*, Hard. 23, and in 7 Rep. 18 b., *Cecil's Case*. For, since the 33 Hen. 8, the Crown cannot interpose and prevent the subject's execution, when he has obtained judgment before the Crown process is awarded; but in that case the subject may sue out his execution, and reap the funds of it, if he can sell before the King's execution comes into the sheriff's hands. By obtaining a judgment before the Crown process is awarded, the subject entitles himself to run a race with the Crown, so to speak, which he could not do before the Statute 33 Hen. 8, nor, as I apprehend, can do even now, where he has not so obtained judgment; although, in all cases, according to *The Attorney-General v. Fort*, reported in a note to *The King v. Giles*, 8 Price, 364, if the Crown suffers the goods to be sold under a *feri facias*, before it interposes, its process is too late, whether sued out before or after judgment obtained by the

subject. The Statute 33 Hen. 8, not only, as I humbly conceive, enables the subject to run a race with the Crown, in certain cases, but it leaves the issue of that race to depend on the common-law maxim which I stated long ago, * "Quando jus domini Regis," &c., which maxim is not * 83 denied, and is established by numerous cases ; otherwise, if the words of the 74th section are to be taken in their literal sense, this absurd consequence, among others, would follow, that if a subject obtained a judgment, but did not take out execution for six months, another subject might in the interim commence a suit, proceed to judgment, take out a *fiery facias*, and deliver it to the sheriff, and so obtain priority, but that the Crown could not, as it is well put in the argument in *Rorke v. Dayrell*, 4 T. R. 406. If A. recover judgment against the King's debtor on 1st January, but do not deliver his writ of execution till the 4th, and B. also recover judgment against the same person on the 3d, and deliver his writ on the same day, and on the 2d an extent issues at the suit of the Crown, and is delivered to the sheriff ; according to the construction contended for, this absurdity would follow, that the King would not be preferred as against A., though he would as against B. And yet it must be admitted that B. is entitled to a preference against A.

The literal meaning of the words of this section cannot, therefore, be adopted ; nor am I able to see any construction that can reasonably be put upon the statute other than that which I have imperfectly expressed ; but will be found infinitely better stated in Mr. Baron GRAHAM's judgment in this very case, 8 Price, 362, and in Lord Chief Baron MACDONALD's judgment in *The King v. Wells and Allnutt*, reported in a note to *Thurston v. Mills*, 16 East, 278. Mr. West says, in his book on Extents, p. 108, that the Statute 33 Hen. 8 gave the Crown a new kind of execution for all its debts, a species too of execution which before the statute was the subject's, and the subject's only. This he deduces from the 50th & 53d sections of that Act. I think that he is wrong in that view of the statute ; and that the proceeding * by ex- * 84 tent in the first instance, at the suit of the Crown, existed long before the Statute 33 Hen. 8, and was only modi-

fied and restricted by that Act: but whether he be right or wrong is not, in my humble opinion, material; for even if he be right, I still hold that the true construction is that which I have already expressed.

I will now proceed to consider some of the cases in which this question has arisen or been discussed. And first, the case of *Uppom v. Summer*, 2 Bl. 1251 & 1294. The judgment was given by Justice GOULD, in Easter term, 9 Geo. 3, delivering the opinion of Lord Chief Justice DE GREY himself, NARES and BLACKSTONE, Justices: he grounds his judgment, first, on the Statute 33 Hen. 8, as to which I have already spoken; and, secondly, on authorities which I will proceed to examine. He first distinguishes *Stringefellow's Case*, Dyer, 67 b, as not having arisen on a judgment but on a statute staple, and therefore not being within the provisions of 33 Hen. 8; and then relies on the case of *Lechmere v. Thorowgood*, 3 Mod. 236, and *The Attorney-General v. Andrews*, and on a passage in the Digest by Lord Chief Baron COMYNS, who, tit. Debt (G. 8), after citing 33 Hen. 8, says, "therefore if execution be upon a judgment against the King's debtor, and before a *venditioni exponas*, an extent comes at the King's suit, those goods cannot be taken upon the extent," and cites for this position the two cases just above mentioned; and GOULD, J., also mentions the case of *The King v. Dickenson*, Parker, 262. That was a question as to administration of assets, in which the point decided was that a judgment creditor of the deceased should be preferred to a simple-contract creditor, who, being a debtor to the Crown, had, after the death of the deceased, procured an extent in aid; a case wholly foreign to the question in *Uppom v. Summer*. The

* 85 authorities, * therefore, on which Lord Chief Baron

COMYNS and GOULD, Judge, rely, are reduced to the two before mentioned, *Lechmere v. Thorowgood*, and *The Attorney-General v. Andrew*. GOULD, J., says, that the former of these cases is obscure, arising from its being reported piece-meal, and in different books, and recommends reading them in order of time as they occur, viz., the pleadings, 2 Jac. 2; 2 Ventr. 159; the first argument, 4 Jac. 2, 3 Mod. 236; the second argument and judgment, 1 Wm. & Mary, Comb. 123;

1 Show. 12; and a subsequent action between the same parties, in effect, in the Common Pleas, in *Lechmere v. Toplady*, 2 Ventr. 169; 1 Show. 146.

I have read them all in that order, and although there are some loose *dicta* and extra-judicial matters stated, yet it is easy to find out what points were really determined; and they were simply these: 1st, that in an action of trespass by assignees of a bankrupt against a sheriff, who had seized goods under a *fi. facias* after a secret act of bankruptcy, the sheriff could not be made a trespasser by relation; this was *Lechmere v. Thorowgood*. And, 2dly, that in an action of trover, for the same seizure, against the execution creditor, the judgment for the sheriff in the action of trespass was a good bar by way of estoppel; that was *Lechmere v. Toplady*. I do not mean to say that I at all agree to the decision on the last point; but it was the point decided, and the only point.

With respect to *Lechmere v. Thorowgood* the facts were shortly these: The sheriff seized goods of one Toplady on the 29th of April, under a *fi. fa.*, after a secret act of bankruptcy, committed on the 28th of April; and whilst the goods remained in his hands unsold, viz., on the 4th of May, an extent, at the suit of the Crown against Toplady, was delivered to him. On the 5th of May a commission of bankruptcy issued * against Toplady, under which the * 86 plaintiffs were appointed assignees, and sued the sheriff in trespass, a special verdict was found, and it was held that the action would not lie. Some of the reports say that it was held that the extent came too late, but this point could not have been determined, for the Crown was no party to the suit, and was not heard; therefore no right of the Crown could be decided in it. Again, the Crown and the execution creditor were on the same side, the sheriff, the defendant, having seized for both, no point therefore as between them could arise in the case, especially as the defendant succeeded, because it was held that the sheriff could not be made a trespasser by relation. All the reports agree in stating that to be the point decided; even Comberbach so states, although he makes Lord Chief Justice HOLT say, "the property in goods is vested by the delivery of the *fi. facias*, and extent after-

wards for the King comes too late, and this by the Statute of Frauds and Perjuries." This must be a mistake ; it is contrary to Lord HOLT's own position in *Smallcomb v. Cross*, Lord Raym. 252 ; it is wholly beside the question before him, and makes him consider the statute as binding on the King, who is not named in it. Lord MANSFIELD, in *Cooper v. Chitty*, 1 Burr. 36, says that Lord HOLT could never say that the property in the goods vested by the delivery of the *feri facias*, and that the extent for the King afterwards came too late ; and adds, no inception of an execution can bar the Crown ; and Lord ELLENBOROUGH also points out the inaccuracy of Comberbach very forcibly in 4 East, 539, *Payne v. Drewe*.

With respect to the case of *The Attorney-General v. Andrew*, it is quite apparent from a perusal of that case that the execution, which was by *elegit*, was perfected and completed by delivery of the lands before the King's writ issued ; * 87 and then, as Lord Chief Baron STEEL says, * " the subject's title is prior to the King's, and is executed." The same law and the same consequences have since been held to attach in *The Attorney-General v. Fort*, and in *Swain v. Morland*, 1 Bro. & Bing. 370. The two cases cited, therefore, do not bear out the position of Lord Chief Baron COMYNS, nor the decision in *Uppom v. Summer* ; and that decision must be supported, if at all, on the Statute 33 Hen. 8, on which I have already remarked. The next case is *Rorke v. Dayrell*, 4 T. R. 402. That case was decided principally on the authority of *Uppom v. Summer* and the authorities there cited, and if they should be wrong, the decision in *Rorke v. Dayrell* is wrong also. Lord KENYON puts the case on the ground at change of property, for he says, " that as long as the property of the debtor remains unaltered, and an execution at the suit of a subject and an extent at the King's suit issue against the debtor, the title of the latter must prevail, for the point to be considered in these cases is in whom is the property." He adds : " I have always understood it to be clear and settled (and this question has very frequently occurred in the Exchequer) that if an extent at the suit of the Crown be issued prior to the time when the subject's execution is delivered to the sheriff, the former shall have the preference.

But as by common law, abridged as it is by the Statute of Frauds, the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the Crown can attach." Now, with all possible respect for every thing which fell from Lord KENYON, I humbly conceive that he has here confounded the binding the property in goods and the alteration of the property, and that he is mistaken in supposing that * the property in goods is or ever was at * 88 all bound or altered either by the *teste* or delivery of the writ as regards conflicting writs, and that the binding is only as regards the debtor himself, as I have before shown; and if so, the very foundation of his judgment fails: the other Judges put the case on the Statute 33 Hen. 8.

These are the only decisions in favour of the subject's execution: for *Thurston v. Mills*, 16 East, 254, went off on another point. Against them are the uniform decisions of the Court of Exchequer, one of which is reported at length, viz., *The King v. Wells and Allnutt*, in the note to *Thurston v. Mills*, 16 East, 278: this is subsequent to both *Uppom v. Summer* and *Rorke v. Dayrell*, which are cited and relied on in argument. Now, without fully agreeing to every word said by Lord C. B. MACDONALD, in giving the judgment of the Court (some of whose positions, according to the letter, I confess appear to me untenable), I, for one, am perfectly satisfied with the general reasons given in that judgment. The same point was again discussed and decided in *The King v. Sloper and Allen*, 6 Price, 114, which is still later. There are other prior cases to which I could briefly refer; and, first, *Stringefellow v. Brownsoppe*, Dyer, 67 b, which was decided Mich. T. 3 Ed. 6, seven or eight years after the 33 Hen. 8. In that case, the sheriff seized Brownsoppe's goods under an *extendi facias* upon a statute staple, at the suit of Stringefellow, and before any writ of *liberate* the King's writ of extent came into his hands; and the Court held that the King's writ should be preferred, because the property in the goods was not in Stringefellow before they were delivered to him by writ of *liberate*. It is said that this is no authority to the present point, for that the *extendi facias* is in the nature of

a judgment, and the *liberate* is the execution ; therefore,
 * 89 as a judgment operates no change of property, so * nei-
 ther does seizure under the King's hands under an *ex-*
tendi facias ; but that as delivery under a *liberate* operates a
 change of property, so does seizure under a *feri facias*. Now
 I cannot understand this reasoning at all ; I can see that the
 award of an *extendi facias* may be and is analogous to a
 judgment, but how a seizure under it can be so, I am at a loss
 to comprehend. Again, I can see how delivery under a *liber-*
ate of the specific goods to the creditor, as is always done,
 may be and is analogous to sale under a *feri facias*, which
 directs the sheriff to make money of the goods ; but how the
 mere seizure into the sheriff's hands under a *feri facias*
 should be analogous to a delivery over to the creditor under
 a *liberate*, I am at a loss to comprehend : I apprehend that
 seizure under an *extendi facias* is the inception of the execu-
 tion, and so is seizure under a *feri facias* ; delivery under a
liberate is the completion, and so is sale under a *feri facias* :
 the only difference is that a *liberate* must issue to enable the
 sheriff to deliver in the one case ; whereas, in the other, he
 may and ought to sell without a *venditioni exponas* ; but this
 difference cannot vary the effect of the seizure. The princi-
 ple established in *Stringefellow's Case* is, in the words of Lord
 MANSFIELD, that no inception of an execution can bar the
 Crown. *Stringefellow's Case* was against the opinion of some
 of the profession at the time, but it has been recognized as
 good law many times since, and seems to me to be directly in
 point. Next comes *Curson's Case*, 3 Leon. 239, and 4 Leon.
 10, which only shows that after delivery under a *liberate*, the
 King's writ is too late. In *The King v. Peck*, Bunb. 8, it
 was taken for granted that if an extent comes after seizure
 under a *feri facias*, and before sale, it shall be preferred. In
The Attorney-General v. Capel, 2 Show. 480, the point de-
 cided arose out of a bankruptcy, the King's writ being
 * 90 preferred after an act of bankruptcy * and before assign-
 ment by the commissioners. It is not in point to the
 present question, but at the end of the judgment are these
 words : " Extents have been held good that have been made
 upon goods actually levied by virtue of a *feri facias* and in

the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." Also in 5 Mod. 376, *Smallcomb v. Buckingham*, which is the same case as is elsewhere called *Smallcomb v. Cross*, there is a *dictum* to the same effect, and many others in other places, all which *dicta* I merely notice to put them in opposition to other *dicta* as to the vesting and alteration of property by seizure. Lastly, comes the case of *The King v. Cotton*, Parker, 112; that was the case of goods seized under a distress for rent; and it was held that they were still liable to be taken under an extent at the suit of the King, though in the custody of the law, and therefore privileged from being taken in execution by a subject. It is said that this case is not in point, because no property at all in the goods is gained by the distrainer, who can neither maintain trespass nor trover for them, and that such is the ground of the decision, inasmuch as it lay on the claimant in the Exchequer to prove property in himself against the Crown. Now, on looking at the whole of the elaborate judgment of Lord C. B. PARKER in that case, I do not find that he puts the case on the form of the pleadings, but on the general principle that the property is not altered, and therefore the King has preference, and throughout his judgment he cites cases as to the effect of seizure under a *fiere facias*. Proceeding upon that principle, I consider therefore that this case is a strong authority upon principle, unless it can be shown that seizure by the sheriff alters the property, and I submit that the contrary has been shown. It is true that neither *Stringefellow's Case* nor *The King v. Cotton* are direct authorities with regard to the Statute 33 Hen. 8, because in neither of them had the subject obtained judgment.

Upon the whole, then, whether with reference to the Statute 33 Hen. 8, or independent of it, the main points appear to me to be, was the property changed by the seizure, and were the King's writ and the subject's concurring? I say that the property was not changed, and that the writs were concurring. My answer, therefore, to the first of your Lordships is, that in my opinion the writ of extent shall be executed by the sheriff by extending the same goods, seizing

them into the King's hands, and selling them to satisfy the Crown's debts, without regard to the writ of *feri facias* under which he had first seized them. With regard to the second question, I find it uniformly considered that (when once it has issued) an extent in aid has all the force and all the incidents of an extent in chief, and therefore I am of opinion that all things remaining the same, it does not make any difference whether the writ of extent was in chief or in aid.

MR. JUSTICE ALDERSON.—My Lords, the first question proposed by your Lordships for our consideration is in substance this: Whether when goods seized by a sheriff under a writ of *feri facias* remain in his hands unsold, a writ of immediate extent, tested after such seizure, does upon its delivery to such sheriff entitle the Crown to a priority of execution; and after fully considering that question, I have arrived at the conclusion that it must be answered in the affirmative.

This subject has been for a long period *vezata quæstio* in our Courts. And in order the more clearly to explain the grounds on which my opinion is founded, it will be useful to advert in the outset to the extent * of the prerogative of the Crown as to its debts, and the principles on which that prerogative depends, and then to proceed to examine the authorities and the reasons assigned for those determinations, which are to be found in our books on this point.

The prerogative of the Crown as to its debts is laid down in various books, and cannot, I apprehend, be doubted. Lord COKE, in *Harbert's Case*, 3 Rep. 11, states, "that at the common law the body, land, and the goods of the accountant or the King's debtor, were liable to the King's execution;" and he adds, that there were "infinite precedents in the Exchequer" to prove this, antecedent to the 33 Hen. 8, c. 39. Lord Chief Baron GILBERT, also, in his History of the Exchequer, lays it down that the second summons of the pipe is "in the nature of a *levari facias* against the body, lands, and goods of the debtor." And in Lord HOBART's Reports, *Foster v. Jackson*, Hob. 60, the law is very clearly laid down thus: "It is a prerogative to the King to have execution of

body, lands, and goods ; not communicated to the subject but in case of statute merchant and statute staple, and recognizance of that nature ; which is by the statute law ; and therefore the case put in *Bloomfield's Case*, that where the party was taken in execution upon a statute and died, and yet execution was had against goods and lands after, is nothing in this case, for they were all due at the first, and therefore may be taken at once or severally."

And in Madox's History of the Exchequer, Vol. II. p. 183, and subsequent pages, a great variety of instances confirmatory of this passage of Lord HOBART, in all its parts, will be found. I have cited this passage from Lord HOBART at full length, because I shall have occasion again to refer to it in considering the * true construction which ought to * 98 be put on the Statute 38 Hen. 8, and because I think it will be found to afford a sufficient clue to enable us to discover what was the real change in the law produced by that statute as to the prerogative of the Crown.

It is unnecessary to cite other authorities on this subject. The result of them all being, as I conceive, that the King at common law, by his prerogative, could either by one writ or by successive writs, as he might find it convenient, seize the body, lands, and goods of his debtor. And further, that this was originally a prerogative peculiar to the Crown, but afterwards extended to the subject ; viz., as to the body of the debtor by the Statute of Marlebridge, c. 23, the Statute Westminster 2, c. 11, and the statute 25 Ed. 3, and to the lands by the Statute Westminster 2, c. 18, and in the cases of statute merchant and statute staple, and recognizance in nature of statute staple by 13 Ed. 1, 27 Ed. 3, and 23 Hen. 8, c. 6, to the body, lands, and goods.

The next prerogative of the Crown, about which I apprehend there is no dispute, is, that where the right of the Crown and the subject concur, that of the Crown is to be preferred, 9 Rep. 129 b. A prerogative depending, first, on the principle that no laches is to be imputed to the King, who is supposed by our law to be so engrossed by public business as not to be able to take care of every private affair relating to his revenue, Gilb. Hist. Exch. 110 ; and, secondly,

on the ground that by the King is in reality to be understood the nation at large, to whose interest that of any private individual ought to give way. In the quaint language of Lord COKE, "*Thesaurus Regis est firmamentum pacis; et fundamentum belli.*"

And, until restrained by various enactments of the
 * 94 * statute law, this prerogative extended to prevent the other creditors of the King's debtor from suing him, and the King's debtor from making any will of his personal effects, without special leave first obtained from the Crown.

But without further adverting to this ancient state of the prerogative, it is clear that at this day the rule is, that if the two rights come in conflict, that of the Crown is to be preferred.

If, however, the right of the subject be complete and perfect before that of the King commences, it is manifest that the rule does not apply, for there is no point of time at which the two rights are in conflict; nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. But if whilst the right of the subject is still in progress towards completion, the right of the Crown arises, it seems to me that the two rights do come into conflict together at one and the same time, and that the consequence in that case is, that the right of the Crown ought to prevail. Lord MANSFIELD expresses this proposition in shorter language when he says, "no inception of an execution can bar the Crown." *Cooper v. Chitty*, 1 Burr. 36.

Now, if we proceed to apply these principles to the determination of the present case, it will appear that the material facts are these: I. S. has obtained judgment against a Crown debtor, has issued a *feri facias* upon that judgment, and has delivered the writ to the sheriff, and the sheriff, in execution thereof, has seized the goods of the Crown debtor. The question, then, is this: Is the right of the subject perfect at the time when the goods are seized by the sheriff, or is there
 any further act to be done in order to make that right
 * 95 consummate? The most simple criterion of this * seems to be, whether, without any thing further being done,

the execution creditor is entitled to call upon the sheriff for the possession of the goods, or to pay him the debts. Now, I do not believe that it was ever contended that the execution creditor is entitled to the possession of the goods themselves, unless under some contract made between the sheriff and him, which would be equivalent to a sale under the writ. Nor can he call upon the sheriff, even after a return of goods seized *ad valentiam*, to pay him the debt for which the levy is made. If he could, it would be utterly useless to empower him to require the sheriff afterwards to proceed to a sale by the writ of *venditioni exponas*. In fact, it is clear that all he can do, even after such return, is to compel the sheriff to proceed to sale by ulterior process from the Courts. There are many authorities founded on this principle, which show that a seizure of goods *ad valentiam*, is only a temporary bar to the execution creditor, so long as the goods remain unsold in the sheriff's hands. Again, if the goods, after seizure, are destroyed by unavoidable accident, the loss falls upon the debtor. The principle is, that the sheriff is excused, where the execution fails altogether without his fault. And in that case, according to the doctrine laid down in *Foster v. Jackson*, Hob. 60, by Lord HOBART, the creditor may have a fresh writ of *fi. fa.*, and the loss falls on the debtor. There is a third criterion, which is this, that the debtor, on tendering the amount for which the levy is made and the sheriff's charges thereon, is entitled to have a return of the goods seized by the sheriff.

From these premises, two propositions seem to me to follow: 1st, that at no period of time does the execution creditor obtain any property whatever in the goods themselves; and, 2dly, that the general property in the goods *seized *96 remains until the sale in the debtor, and is not changed by the seizure, *Milton v. Eldrington*, Dyer, 98 b. After sale the case is very different, for by the sale the property is wholly changed from the debtor to the vendee of the sheriff, and the money, the produce of the goods, then becomes the property of the creditor, for which he may maintain an action for money had and received, and for which the sheriff is

responsible to him, the original debtor being then wholly and finally discharged: *Parkinson v. Guilford*, Cro. Car. 589.

The rule is thus expressly laid down by Mr. Baron GABROW, in delivering the opinion of the Court, after full consideration of the case of *Higgins v. M'Adam*, 8 Younge & Jervis, 1. "The rule is, that when execution is executed the property is changed, and execution is said to be executed when a sale has taken place." It is not, therefore, till after the sale that the right of the execution creditor becomes consummate, and it would follow from thence, that it is not till after the sale that the right of the creditor ceases to concur with the right of the Crown. If, therefore, the right of the Crown arises at any period prior to the sale, it seems to me that on the principles above laid down, it ought to have the preference.

A preference depending on similar grounds, and terminating at the same period, seems to me to be fully recognized by the Court of King's Bench in *Hutchinson v. Johnston*, 1 T. R. 729. That was the case of two conflicting executions. The sheriff had seized under the writ last delivered to him, but before sale, having discovered that another writ, which was entitled to priority, had been first delivered to him, he made the sale under it, and paid the surplus only to the creditor under the second writ, under which he had originally seized the goods. And the Court expressly decided, * 97 that until sale he had a * right so to do; but after sale, not; *Rybot v. Peckham*, cited in the note, 1 East, 781, being an express authority to that effect. And it is observable that many of the authorities which are relied on in the present case were then cited, in particular, the case of *Clerk v. Withers*, Salk. 322; and the very proposition now before your Lordships for decision, it is to be observed, was urged as clear law by the very eminent persons who argued that case, namely, that till sale the extent prevails over the prior execution; and I apprehend that prior to the Statute of Frauds, if a subject's writ of execution had come to the sheriff after seizure, but before sale, under a writ of a subsequent *teste*, the sheriff would have been in like manner justified in executing it before the other writ under which he had seized,

and would have been liable to an action on the case if he had omitted to do so.

These authorities seem to me to show clearly, first, that no property passes by the seizure from the original debtor to the creditor; and secondly, that even in the case of conflicting rights, as between subject and subject, the point of time to which the Courts uniformly look as the period when the execution is consummate, is not the seizure, but the sale under the writ.

There is one case, however, which requires some observation, as it would seem to trench upon this proposition: I allude to the construction put by the Courts upon the 9th section of the 21 Jac. 1, c. 19. There is no doubt that the Courts have held that the seizure under a writ of *fi. fa.* was sufficient to satisfy the words "execution or extent served and executed" contained in this statute, and that for the purpose of protecting the execution creditor from the effect of a prior act of bankruptcy. But this was a decision upon the construction of a particular statute, and must have reference, reasonably considered, to the *peculiar *98 objects of the legislature. It is to be observed, first, that it was prior to the Statute of Frauds; the law, therefore, then was, that writs of *fi. fa.* bound the debtor's property, as to all persons claiming under him, from the *teste* of the writ, and not from its delivery to the sheriff; so that it was then possible for a party to sue out his writ of *fi. fa.*, and to omit to execute it, and so give to the bankrupt the same species of delusive credit as was provided against by the 11th section, in cases where the bankrupt was the reputed owner of another's goods. It was probably, therefore, with that view that this clause was introduced, providing that such writs should not bind, as against those who claimed under the bankrupt, from their *teste*, but only from the date of the public act done by the sheriff, in seizing the goods under the writ. For this purpose, that of giving notice to the other creditors, the seizure, and not the sale, was the important period.

The present case, however, depends on the question whether the property is changed, and, until sale, this is not

the case; the execution is not complete, so as to transfer the property, until that period. But it is urged, and a great portion of the argument at the bar turned upon it, that although it may be that the execution creditor has no consummate right till after sale, and although the general property in the goods remains until the sale with the debtor, yet that the sheriff has a special property in him from the time of the seizure, and that the Crown, in the event of the *teste* of the extent being subsequent to the seizure, must take the goods subject to that special property. There is no doubt that a variety of authorities may be cited, establishing as clear law, that the Crown, must take subject to a special property created by the act of the party. In the case of the factor, *Rex v. Lee*, 6 Price, 369, it was held, that goods * 99 in his * hands, on which he had a lien for his advance made before the *teste* of the extent, could only be taken by the Crown subject to that lien. So, again, in the case of goods pawned or pledged before the *teste* of the extent, *Rex v. Cotton*, Parker, 112, and in the case of *Rex v. Humphrey*, McLell. & Y. 173, the same law prevails. In *Casberd v. Ward*, 6 Price, 411, an equitable mortgage created before the party creating it became a debtor to the Crown on record, was in like manner held to be valid against a subsequent extent.

But I can find no instance whatever, nor do I believe that any such exists, where a special property, not created by contract between the Crown debtor and the person setting it up, or between the Crown debtor and some one under whom such person claims, has been ever allowed to prevail; and I think good reasons may be assigned for the difference. In the case of land, if the subject sell it before he becomes a Crown debtor, it is clear that the sale is good. Now, on principle, he who can make a valid sale ought to be allowed to make any contract short of that which shall also be valid; he may, therefore, make a valid pledge. The right of the other party is consummate by the act of pledging or of sale; but the cases of a distress for rent before sale, a seizure by the messenger under a commission of bankrupt, and the case now in judgment, are very different. There the goods are

all taken by an adverse proceeding from the Crown debtor, and are all under the custody of the law at the time the extent is put in; the creditor's right is but in progress, and the sheriff, the commissioners of bankrupt, and the distrainer, are real officers of the law, holding the property, and having rights given to them for the purpose of protecting them in their possession, not for their own benefit, but for the purpose of disposing of it for the benefit of *those *100 who may ultimately be entitled to the proceeds of that property. The true description of the state of such property is, that it is in the custody of the law; whereas, in the case of the factor, wharfinger, pawnee, or equitable mortgagee, it is in the custody of the party himself having a beneficial interest under a valid contract.

Lord C. B. GILBERT, speaking of lands (and the principle is the same as applied to goods, although the charge takes effect at a different period), says that nothing can hinder the King's charge but what amounts to a precedent alienation; and a *liberate* in pursuance of a previous judgment amounts to an alienation of the land; and yet before the *liberate* there is a seizure of the land by a public officer, for the purpose of its being by the *liberate* alienated to the creditor. By the seizure the land is taken into the custody of the law, by the *liberate* it is alienated to the creditor, and from the date of the latter the right of the Crown is ousted.

I am aware of the various cases and authorities that exist in which it has been determined that trover will lie by a sheriff after seizure of goods under a *fi. fa.*, and I do not dispute the proposition that this shows that the sheriff has for some purposes a special property in the goods so seized. But it seems to me that this point is not really material. The special property which the sheriff or any other public officer has, is not a property beneficial to himself; it is a property conferred on him to enable him to discharge his public duty. The goods are *in custodia legis*, and the special property of the sheriff is given to him that this *custodia legis* may be rendered safe. If, then, it be true, as many cases have determined, and in particular *The King v. Cotton, Parker*, 112, that goods *in custodia legis* are in a

situation in which the Crown's right and that of the
 * 101 subject may come in conflict, I do * not think that it really makes any difference whether the officer having the custody has greater or less powers to defend it conferred on him by the law. The real question seems to me to be, whether the property has wholly or in part gone from the debtor to some person claiming adversely to the Crown, or whether it is only in progress to that result. The sheriff or other public officer holds it with more or less of powers given for its protection, but really for the person ultimately entitled to receive the proceeds. If that person be a subject, having a prior writ delivered to the sheriff, the sheriff holds for him the proceeds of the goods seized under a subsequent writ, as in *Hutchinson v. Johnstone*, 1 T. R. 729; or if, as in the present case, the Crown's extent comes in before sale, he holds for the Crown.

I have hitherto considered this as if it were *res integra*; but I shall now proceed to consider it upon authority merely. The leading case upon this subject is *Stringefellow's Case*, Dyer, 67 b.; and the authority of that case, though doubted for a time, cannot now, I think, be disputed. It was recognized as good law by Lord HOBART, in *Sheffield v. Ratcliffe*, Hob. 339; by Lord ROLLE, in his abridgment; by Lord HARDWICKE and the two Chief Justices, RYDER and WILLES, in *Rex v. Cotton*; and by the Courts of Common Pleas and King's Bench, in *Uppom v. Sumner*, and *Rooke v. Dayrell*. I do not think it necessary to add the various cases in the Exchequer on this point. It is, however, contended that *Stringefellow's Case* is distinguishable, and undoubtedly it is so, in its facts, from the present. The main ground of distinction is, that there remained in that case a further act to be done by the Court, namely, the award of the *liberate*. And it is said by Mr. Baron WOOD, 8 Price, 318, that the *liberate* and the *fi. fa.* are equivalent to each other; but I think that proceeds

* 102 on a misstatement * of the true point in the case.

The right vested by the *liberate* in the creditor is to have the identical lands and the identical goods delivered to him; the creditor's right is therefore consummate by the *liberate*. But the *fi. fa.* does not command the sheriff to seize

and deliver the goods to the creditor (in which case the *fi. fa.* and seizure would be equivalent to the *liberate* after the previous seizure), but in substance it commands him to seize and sell, and to pay the money produced by the sale to the creditor. The act of sale, therefore, and not the act of seizure, puts the sheriff in the same situation, with respect to the creditor, as the *liberate* under an extent; for by the act of sale the creditor has vested in him a consummate right to the produce of the sale.

Now, *Stringefellow's Case* clearly decides that until the *liberate* the lands and goods seized, and in the hands of the sheriff, remain liable to the Crown process: that case, therefore, appears to me in principle to have decided that until the creditor obtains a consummate right, the Crown's rights are not ousted, and so to govern the present case.

The case of *Rex v. Cotton* is a much stronger authority; it seems to me to be decisive of this question. Its authority, looking at the person by whom it was decided, and those by whom that decision was affirmed, must be admitted to be of great weight. It is not a little singular to find, that although the point now before your Lordships was there treated as the proposition, and that case as the corollary, it should now be contended, that although *Rex v. Cotton* is good law, still the proposition from which that case was in truth only a corollary, cannot be supported. The principle there laid down clearly was, that goods in *custodia legis* continued liable to an extent until the period arrived at which some person other than the * original debtor had acquired a consummate * 103 right in them; and the Court clearly held that goods seized by a sheriff, but before sale, were so liable. The fanciful doctrine of a special property in an acknowledged public officer being at all material, seems never to have occurred to those great men who decided that case. The reason why the expressions as to special property are there introduced seems to me obvious enough: the distress is in the custody of the creditor himself, and therefore it might have been plausibly enough contended, that he having the possession, his special property (if he had any) was to be protected for his own benefit. But the Court, looking to the substance and not to

the form, decide that in seizing he acted as an officer of the law ; that he held as such, and that the goods were not really in his possession, but in the custody of the law, they having come to him by a special authority given by the law, and not by the act of the party, as in the case of a pledge or the like, and the consequence being that no property, nor even any possession *in jure*, passed to him. This case seems to me to be *à fortiori* to the present case.

I proceed to enumerate shortly the other cases, in which the law has been laid down in the same way.

In *Rex v. Peck*, Bunb. 8, the reporter says it was taken for granted that the law was so.

In *The Attorney-General v. Andrew*, Hard. 23, it is not indeed distinctly stated whether the party had obtained possession under the subject's prior extent before the right of the Crown commenced, but I think it can hardly be doubted that he had ; for there Lord C. B. STEEL observes, that the subject's title is "prior to the Crown's, and is executed."

Now it appears from *Empson v. Bathurst*, Hutton, 52, that until the *liberate* no fee is due to the sheriff, because the execution is not executed. I think this explains the lan-

* 104 guage * of Lord C. B. STEEL, and makes it consistent with what he adds, that "*Stringefellow's Case* is unanswerable."

In the case of *The Attorney-General v. Capel*, 2 Shower, 482, it is stated that "although the goods were actually *in custodia legis*, yet because the extent came before the property was vested by an assignment, it was held a good extent. Extents have been held good that have been made of goods actually levied by virtue of a *fi. fa.* and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." This latter passage Mr. Baron WOOD (who omits the former part of the report) calls "a note of the reporter, unwarranted by the case." To me it appears as a reason assigned by the Court for their previous judgment.

The case of *Lechmere v. Thorowgood* has been much relied on by the other side ; but I cannot think it to be an authority of any weight. It is observable that the decision in that case is clearly right, and it is difficult to perceive how this point

could ever have arisen. There the extent at the suit of the Crown was executed before any assignment under the bankruptcy had been made; so that, according to all the authorities, the plaintiffs had no ground of action; and the execution and the extent being set up by the same parties, no question of priority *inter se* could well have arisen. Again, the writ of *fi. fa.* was issued before the sheriff had notice of the bankruptcy; and as the action was trespass, the Court, on that ground, might well decide in his favour. The *dictum* attributed to Lord HOLT, that "the King's prerogative had been taken away by the Statute of Frauds," cannot be supposed to have really fallen from that learned Judge: and yet this case, although thus questionable in its application to the present subject, has been one of the main grounds * on which the two principal authorities on the other * 105 side, *Uppom v. Sumner*, and *Rorke v. Dayrell*, have been decided.

The case of *Clerk v. Withers* seems also to me to be wholly inapplicable to the present question; indeed, like *Lechmere v. Thorowgood*, it is only to be cited for certain *dicta* of the Court as to the execution being complete by the seizure, for the decision itself is clear enough. It was there argued, that the death of the creditor, after seizure under the *fieri facias*, did not give to the debtor the right of recovering back his goods from the sheriff. And the Court held that it did not; for on the one hand there was no act to be done in Court necessary to give the sheriff authority to act, his authority being complete by the *fi. fa.*; and therefore the death was immaterial to the purpose. But, 2dly, the levy under the writ was pleadable in bar to another action for the same debt; so that the debtor sustained no injury by the execution proceeding. But indeed this case would prove too much; for it is also true that after the award of the *fi. fa.*, and before seizure, the same result would follow.

Thorowgood's Case, Noy, 78, cited by GOULD, J., in giving his judgment. Now it is not pretended that an award of *fi. fa.* would bar the crown before seizure; the principles, therefore, of that decision are wholly inapplicable to this question. There are some *dicta* in that case, certainly, which may be

relied on ; but I think that if they are read, as all such *dicta* ought to be, with reference to the case then before the Court, they also will be found not applicable to the present subject. To some purposes, no doubt, the execution may be called complete by the seizure. It undoubtedly was so at that time, as regarded priority between an execution creditor and the assignees of a bankrupt. It was not so in all cases, however, * 106 even between subject and subject, * as appears from *Hutchinson v. Johnstone* ; and I think it is not so *à multo fortiori* in a case between the subject and the Crown, which has a prerogative peculiar to itself of interposing *in medio*.

Curson's Case, 3 Leon. 239, is still less applicable ; it depends on a totally different principle. There Curson acknowledged a statute to Starkey, and afterwards another to J. S., who assigned to the Crown : the liability, therefore, on which the Crown proceeded was created subsequently to that to Starkey. After this, Starkey obtained possession under his execution ; and it was held that the debt to the Crown did not bind the lands from its assignment, so as to avoid the subsequent but consummate execution. It may be observed, also, that this case is within the Stat. Hen. 8 ; for the judgment was prior to the King's debt, and the execution was consummate before the King's extent. Lord C. B. GILBERT, p. 94, gives this reason for it ; for he says, " the creditor Starkey did not by the *liberate* take the land *sub onere* of the King's debt, because his lien was antecedent to it ; and it were repugnant to construe him to take the land *sub onere* of the king's debt, when he took it in satisfaction of a debt precedent." So again, on the same principle, it has been held that if A. infeoff B. of his lands, after a judgment confessed by him to C., the Crown, as assignee of C., cannot take more than C. could, viz., a moiety of the land ; although, no doubt, if the judgment had been confessed to the Crown originally, the Crown could have taken the whole. In fact, it depends on the principle that where the law allows a party to contract, it will not permit that contract, by any matter arising *ex post facto*, to be made of no value, — a principle to which I have before referred, in distinguishing goods on which

there is a lien by contract from goods in the custody * of * 107 the law.

The case of *Uppom v. Sumner*, which is the leading authority on the other side, would, I think, be entitled to much greater weight if it had not proceeded a good deal on the case of *Lechmere v. Thorowgood*. Even taking the different reports of that case in the way suggested by Mr. Justice GOULD, no great advantage as to clearness can be derived; and I cannot help thinking that the better course would have been to have placed no great reliance on a case in which a part was to be picked up from one reporter and a part from another, in order to make something like a connected account, instead of attributing the confusion to the most obvious and natural cause, viz., the inaccuracy of the reporter.

The same observation applies to the case of *Rorke v. Dayrell*; the Court there also relied a good deal on *Lechmere v. Thorowgood*. I shall not at present refer to the main ground on which both these cases proceed, viz., the Statute of Hen. 8, because I proceed to consider that question separately. Subsequently to both these, the cases of *Rex v. Wells and Allnutt*, and *Rex v. Sloper and Allen*, arose, in which the present question was decided, after reviewing all the authorities in the affirmative.

Upon the whole, I have arrived at the conclusion that the preponderance of authority also, as well as the principle on which such authorities ought to proceed, establishes the proposition, that where an extent of the Crown comes after seizure and before sale, it ought to be preferred, unless by the Statute 33 Hen. 8, c. 39, § 74, there has been an alteration made in the ancient prerogative, by which the priority has been taken away.

I therefore come, in the last place, to the consideration of the true construction of that statute. There can be no doubt, even without authorities on this subject, that the statute must be construed as abridging the prerogative: but authorities * are not wanting. In *Cecil's Case*, 7 Rep. * 108 92, the Court so expressly resolve; and other passages might be as easily cited, if necessary, to the same effect. The real question, however, is, not whether the prerogative is

abridged, but to what extent it is abridged, by the clause. If taken literally, the clause would, as has been well observed, place the Crown in a worse situation than a subject: this could hardly be the real intention of the legislature, in a reign not remarkable for such concessions. There are, however, two grounds, either of which, as it seems to me, is sufficient to show that this clause of the statute is not applicable to the present question. First, the words are confined to suits commenced or taken, or process awarded, for the recovery of the King's debts. Now, I apprehend that an immediate extent does not fall within either of these descriptions; they are confined to suits and process for the recovery of the King's debts in the ordinary course from his solvent debtors. An immediate extent is founded on an affidavit of the insolvency of the debtor, and issues not for the purpose of seizing his property for the amount of the debt, but all his lands and goods into the hands of the Crown, there to remain till the Crown debt is satisfied. It is, therefore, rather like a forfeiture incurred by him in consequence of his failure, than a suit or process for the recovery of the debt. Again, it may, according to the admitted course of the Exchequer, issue in the midst of the proceedings in an ordinary suit, and even where the debt is disputed; *Rex v. Pearson*, 3 Price, 288. In an ordinary extent, which is a prerogative execution, the debt of course is conclusively settled by the judgment; but in an immediate extent the debt is not settled, but may be disputed by the debtor on the return of the writ: in

* 109 fact, it is then that the suit or process * respecting the King's debt, properly speaking, begins. These various differences seem to me to show that this proceeding could not have been contemplated by the legislature, when they speak in this clause of suits and process for the recovery of the King's debts. But, 2dly, I think, and this will appear from a reference to the state of the law as it existed at the time the statute was passed, that even if an immediate extent were a suit or process for the recovery of the King's debt, still the clause would not be applicable to this case.

This is very clearly stated by Lord COKE, 1st Inst. 131 b.:
 "As to the third protection *cum clausula volumus*, the King,

by his prerogative, regularly is to be preferred in payment of his duty or debt by his debtor, before any subject, although the King's debt or duty be the later; and the reason hereof is, for that '*thesaurus regis est firmamentum belli et fundamentum pacis*;' and therefore the law gave the King remedy, by writ of protection, to protect his debtor, that he should not be sued or attached until he paid the King's debt. But hereof grew some inconvenience; for to delay other men of their suits, the King's debts were more slowly paid; and for remedy thereof it is enacted by the Statute 25 Ed. 3, c. 19, that the other creditors may have their actions against the King's debtor, and proceed to judgment, but not to execution, unless he will take upon him to pay the King's debt, and then he shall have execution against the King's debtor for both the two debts."

It appears, therefore, that when the Statute 33 Hen. 8 was passed, the creditors of a Crown debtor could not proceed further than judgment, but were liable to be restrained altogether from taking out execution upon such judgment. By that statute new powers were given to the Crown, and new restraints, on the other * hand, imposed on * 110 the prerogative: certain debts to the King, not of record, which before did not bind the subject till recorded, were placed on the footing of a statute staple, and so bound from the time of contracting them. It is so laid down by Lord C. B. GILBERT, page 88, and is in conformity with the general law, which I have before stated from Lord HOBART's reports; for, in order to make the King's debts, not of record, bind from the time of their contracting, a statute would clearly be required. Lord C. B. GILBERT, in another part of his treatise, says, "this branch of the statute had its origin in the practice introduced by the 3 H. 7. c. 3, of taking recognizances to the King before justices of the peace, instead of the ancient mode in use, before conservators of the peace, sheriffs, and constables; the two latter of whom, when they bailed, took the obligation in their own names, and not to the King. Now these recognizances to the King being only personal securities, it became a doubt whether they began to bind the lands of the subject, and formerly they

held that such recognizances did not bind the land till they were returned of record." And the 56th section, which, construed literally, would appear wholly useless, as far as related to the Court of Exchequer, may, I apprehend, have a sensible construction given to it by referring to the second part of the 54th section, by which the King was authorized to proceed with suits depending in the name of a common person, to his Grace's use, and which therefore required to be placed on the same footing as to execution with suits originally brought by the Crown. I think, therefore, that so far as relates to the King's debts, all that was in effect done by the various sections of the 38 Hen. 8, c. 39, was to give a

priority to the particular debts not being of record, as
 * 111 if they had been contracted * originally by a recognizance in the nature of a statute staple, which binds from the time of the contracting. Now, reasoning *a priori*, it would be probable that such a new power would have some counterbalance, in order to place the subject as nearly as possible in the same situation as he was by the 25 E. 3. By that Act the subject's writ of execution might be stayed from the time the King's debt on record was contracted; a date easily to be ascertained; but when the King's debt, not of record, was to bind by this new power from the time of its being contracted, it might become very difficult for a third person to ascertain that period: and it might well be considered unjust to superadd such a hardship in the case of a person who levied under an execution, sued out, indeed, after the King's debt was contracted, but after a contract, of which, not being of record, he could know nothing. It would, therefore, be not unnatural to suppose that some restriction would be imposed, rendering it necessary for the Crown, seeking to avail itself of the new power, to take some public steps before the judgment obtained by the subject should thus lose its efficiency. Now, I apprehend that this was in fact done by the 74th section, which I construe as providing, that if, before the King's debt is put in suit, the subject has obtained a judgment, on which, but for the new law, he might have sued out a writ of execution in due course, he shall still have the writ of execution, and proceed

on it, notwithstanding the King's debt was in existence, and in defiance of any writ of protection from the Crown. In this case, therefore, the Crown is prevented from staying the proceedings by any writ of protection, and the creditor, if, by using due diligence, he can cause the sheriff to seize the goods and sell them before the extent comes on the part of the Crown, shall be entitled to reap the *fruits *112 of his diligence. The words are, "the King shall have first execution," which I think means, "shall first have a writ of execution from the Court." In like manner, in the Statute 25 E. 3, c. 19, the words are, that the creditor, having settled for the King's debt, "shall have execution" against the defendant, which clearly there means, shall have a writ of execution. Upon the words, therefore, as well as upon the intention of the 33 H. 8, c. 39, § 74, as collected from the Act itself, compared with the statutes which preceded it, I have come to the conclusion, that according to the true construction of the 74th section, it has no reference whatever to the question now before your Lordships. I am aware that this is contrary to the construction put on the statute in the cases of *York v. Dayrell*, and *Uppom v. Sumner*; but after fully considering those authorities, and the reasons assigned there, which do not satisfy my judgment, and finding them in opposition, as it seems to me, to the cases of *Rex v. Cotton*, *Attorney-General v. Capell*, *Rex v. Peck*, *Rex v. Wells & Allnutt*, *Rex v. Sloper & Allen*, and, I should also say, to *The Attorney-General v. Andrew*, and the uniform course of the Court of Exchequer, I think that those cases are not well decided, and that, both on the ground that they are contrary to the true construction of the Act, as deduced from a proper reading of it, if the question were *res integra*, and also on the ground that they are opposed to cases of greater weight and authority, to which I have also referred. I have to apologize to your Lordships for the length at which I have considered this question; but I trust that the importance of it, and the great weight due to the authorities, on both sides, will be a sufficient reason for my having so done.

On the second question I shall not detain your
 * 113 * Lordships, as I believe there is no difference of
 opinion upon it. I think that it should be answered
 in the negative.

MR. JUSTICE TAUNTON. — The first question propounded by
 your Lordships to the Judges is one of very considerable
 difficulty, arising, in my humble judgment, not so much from
 the nature of the subject, when properly understood, as from
 the conflicting decisions of the Courts in Westminster Hall.
 This question may be considered in two points of view, first,
 whether by the seizure, on the part of the sheriff, of the goods
 under the writ of *feri facias*, the property is so altered as to
 leave nothing in the debtor upon which the writ of extent
 can attach; and, secondly, whether the Statute 33 Hen. 8,
 c. 39, § 74, applies to the present case; which latter inquiry
 involves a consideration of the law as to the prerogative with
 respect to the King's debts before and at the time of passing
 that statute.

With respect to the first point, it is so clearly laid down in
 all the text-books, as a general proposition, that the property
 of goods is not altered, but continues in the defendant until
 execution executed, that it cannot be necessary to say much
 on that point. But then a question arises, when is execution
 executed, that is, completed? It would seem from the lan-
 guage of the writ of *feri facias*, that the sheriff has not com-
 pleted the whole of his duty under the writ until he has
 converted the goods and chattels seized into money, for
 the writ enjoins him, that of the goods and chattels of the
 defendant he cause to be made so much money; and he is
 further enjoined that he have that money before the King
 at Westminster, on the return-day, to be rendered to the
 plaintiff; so that the selling or making of the goods

* 114 into money appears to be the most * essential part of
 the sheriff's duty. But it has been contended in many
 of the cases upon this subject, and more particularly by the
 late Mr. Baron Wood in his elaborate judgment in the case of
The King v. Giles, 8 Price, 314, that the execution is executed
 by the seizure, and certainly, if that were the case, there

would be an end of the question, because it is abundantly clear that after execution executed an extent from the Crown comes too late. *The Attorney-General v. Fort*, 8 Price, 364, in a note. In such case the property is altered, and the Crown cannot, in process against A., seize the goods of B. Considering the authority by which this proposition of the seizure alone changing the property has been maintained, it becomes necessary to investigate the law upon the subject, and examine the grounds upon which it has been supported. If the property be altered by the bare seizure, to whom does it pass? They say to the sheriff. But this cannot be, for the goods would not be forfeited by his outlawry or conviction of felony, nor would they pass under a grant of all his goods; and if, after seizure, the defendant pays the debt to the sheriff, he is entitled to have his goods again, without any grant from the sheriff, or, if a leasehold, without a reassignment. So also, I apprehend, if goods in execution are burnt or otherwise injured, without fault of the sheriff, it is the loss of the defendant. The sheriff, under the writ, has a mere power to sell, without any interest vested in him, except that which every bailee, such as a carrier, wharfinger, &c., who is answerable over, has for his own protection. This interest, if so it may be called, is denominated a special property, as contradistinguished from a general property, and in respect of this we know that he may bring trover for the goods seized against a stranger, but it is not a beneficial interest. In addition to these * illustrations, there is the authority of * 115 Lord HARDWICKE, who lays it down, in 2 Eq. Cases Abridged, 381, that neither before the Stat. of Frauds, nor since, is the property in the goods altered, but continues in the defendant until the execution executed. The cases cited by Mr. Baron WOOD, in support of his opinion that the property is altered by the sheriff's seizure, and before actual sale, by no means bear him out. The first case he cites, with respect to goods and chattels, is *Lechmere and others v. Thorowgood and another*, Comberb. 123; 3 Mod. 236. That was an action of trespass, not trover, brought against the sheriff. The extent there was after the seizure, and before any sale or *venditioni exponas*; and it appears, certainly, that a question

was made, whether the extent did not come too late, and the Judges are reported to have intimated an opinion that it did; but the case was not decided upon that ground; judgment was ultimately given for the defendant (and not for the plaintiffs, who impeached the validity of the extent), upon the ground that they could not be made trespassers by relation. The opinions, therefore, thrown out, were mere *obiter dicta*, and the reports themselves are very loose and unsatisfactory. In one of them, Comberbach's, Lord HOLT is, indeed, reported to have said, "the property of the goods is vested by the delivery of the *feri facias*;" but this is directly contrary to the opinion of Lord HARDWICKE, in 2 Eq. Ca. Abr., and to the cases of *Bardon v. Kennedy*, 3 Atk. 739, and *Phillips v. Thompson*, 3 Lev. 191; in the latter of which it was decided, that by the delivery of the writ, the goods were only so bound that the defendant could not dispose of them afterwards, and that the delivery of the writ to the sheriff is

no execution thereof; and this *dictum* of Lord HOLT,

* 116 Lord MANSFIELD, in *Cooper v. Chitty*, 1 Burr. 20, * suspected was a mistake of the reporter. The next case relied on by Mr. Baron WOOD, is *Clerk v. Withers*, 6 Mod. 290; in that case the principal question was, respecting the operation of the Stat. 17 Car. 2, c. 8, upon a judgment by default, obtained by an administrator, whether, as that statute applies in terms only to judgment after verdict, there could be any personal representative of the intestate who could by process compel the sheriff to sell. It was incidentally contended there by counsel, that a seizure by the sheriff was a satisfaction of the debt, and therefore that the plaintiff, who had brought a *scire facias* to have restitution, should not have it. But the utmost length to which Lord HOLT carried this, was, that the seizure to the value of the debt discharges the defendant, unless the execution be afterwards avoided, and that the seizure, so long as it continues, is a sufficient bar. But the point really determined was, that an execution, being an entire thing, when once begun shall, as between the parties, be proceeded with, notwithstanding a change of sheriff, or the death of the plaintiff, nothing having occurred to avoid the seizure, or to intercept the authority of the sheriff before

sale: the sale under such circumstances being considered but a formal part of the execution. There was no decision that, as against one having a paramount claim, the property by the seizure was irrevocably changed, but the whole is consistent with the hypothesis, that the goods in such a case are in the custody of the law. With respect to the argument drawn from the Statute 21 Jac. 1, c. 19, which provides, that where no execution or extent has been served and executed, creditors by judgment statute, &c., or other security, shall not be relieved thereupon for more than a ratable part of their just and true debts with the bankrupt's other creditors, * without respect to any greater sum in such judgment, * 117 &c., or other security; upon which it has been determined, that when a creditor has obtained judgment and sued out execution, and a seizure has been made under it, if before sale an act of bankruptcy intervenes, the judgment creditor shall not be obliged to come in under the commission, but the sheriff may proceed to sell the goods; and from which determinations Mr. Baron WOOD draws the conclusion, that they must have proceeded on the ground, that as soon as goods have been seized under a *feri facias*, that seizure is considered in law as being an execution executed: the answer is, that these determinations only prove that, as between subjects, an execution once begun by seizure shall proceed notwithstanding a subsequent act of bankruptcy and commission issued; and in the case of *Audley v. Halsey*, Cro. Car. 148, which I believe was the first decision to this effect, wherein the circumstances were nearly the same with those in *Stringefellow's Case*, Dyer, 67, b, the main difference being, that in the one the bankrupt commissioners claimed against the extent upon the statute staple, and in the other the Crown, the Court expressly distinguished it from the case in Dyer, by saying, "for there, although the goods were extended, yet they were not delivered to the cognusee, and the writ was not returned, and the writ of privilege was for debt due to the King, wherein the King has his prerogative by the common law." In addition, I may observe, that the distinction taken in the recent cases of *Wymer v. Kemble*, 6 Barn. & Cres. 479; *Nottley v. Buck*, 8 Barn. & Cres. 160; and *Morland v. Pellatt*, ib.

722, which were in exposition of the Statute 6 Geo. 4, c. 16, § 108, proceeded principally upon this very difference between a mere naked seizure before bankruptcy, and a seizure consummated by sale, or the payment * of the money directed to be levied. In *Wymer v. Kemble*, the goods of the debtor had been seized under a *feri facias*, and delivered to the creditor under a bill of sale by the sheriff, then a bankruptcy followed, and it was held that the plaintiff had ceased to be a creditor, the original debt having been extinguished by the sale. The like decision was come to in *Morland v. Pellatt*, where, though there had been no sale of the goods, the balance of the money directed to be levied had been paid over to the sheriff before the act of bankruptcy; but in *Notley v. Buck*, where the sheriff had made a seizure before the act of bankruptcy, but the goods remained in his hands unsold at the time of it, it was held that the sheriff could not pay over to the creditors the proceeds of the execution received upon a sale after the bankruptcy.

But although the position that the property is not divested out of the debtor by mere seizure under *feri facias* was partly admitted by the counsel for the plaintiff in error in this case, yet it was most strongly pressed by him in his argument, that by the seizure the judgment creditor here had a claim on the goods, or a special property therein, and that the Crown under an extent can only take, subject to that lien, a special property; and this right of the judgment creditor, he observed, had not been adverted to in any of the cases, with respect to the property. Many other cases might be added, but enough probably has been said; and I will only add the authority of Mr. Justice BAYLEY. In *Morland v. Pellatt*, that learned Judge says, “after seizure and before sale, the sheriff has a special property in the goods, but the debtor has the general property up to that time, therefore the debt is not extinguished, and the judgment creditor has a security for his debt; * 119 this special property is * in him, not as trustee for the judgment creditor, but for the purpose of his own protection.” Neither had the judgment creditor in this instance any lien on the goods. Let us see what a lien is? In *Hammond v. Barclay*, 2 East, 227, Mr. Justice GROSE says, “A

lien is a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied." The Master of the Rolls, in *Gladstone v. Birley*, 2 Meriv. 404, lays it down, "the question always is, whether there be a right to detain the goods till a given demand shall be satisfied." In *Lickbarrow v. Mason*, 6 East, 25, note, Mr. Justice BULLER observes, "liens at law exist only in cases where the party entitled to them has the possession of the goods, and if he once parts with the possession after the lien attaches the lien is gone." In *Heywood v. Waring*, 4 Camp. 291, Lord ELLENBOROUGH says, without possession there can be no lien. A lien is a right to hold, and how can that be held which was never possessed? In *Hallett v. Bousfield*, 18 Ves. 188, Lord ELDON (a) asks, "how can the doctrine of lien, that is, the right of a party having property in his possession to retain it until his demand is satisfied, be applied to the interest of a freighter, who has no possession, the whole being in the possession of the owner?" (And many other *dicta* to the same effect are collected by Mr. Montague in his Summary of the Law of Lien, Introd. Ch. p. 1, &c.) So here I ask, how can the doctrine of lien, to retain these goods, be applied to this judgment creditor, who had no possession, the goods being in the possession of the sheriff? The sheriff seizes, not as the agent or servant of the party, but as a minister of justice, and an officer of * the Court, therefore his possession is not the pos- * 120 session of the creditor, but the custody of the law; but if there was no lien, the cases of *The King v. Humphery*, 1 McCl. & Y. 173; *The King v. Lee*, 6 Price, 369; and *Casberd v. The Attorney-General*, 6 Price, 411, which were cases of a wharfinger's and a factor's lien, and an equitable mortgage by deposit of the title-deeds, are inapplicable, the creditor there having actual possession of the articles in respect of which he claimed. But when goods are in what is called the custody of the law, the property is as it were in abeyance, and must ultimately belong to the party to whom, under all the circumstances, the law adjudges it.

(a) The question here ascribed to Lord ELDON is given in the report among the arguments of counsel.

But it was said, that the judgment creditor, by force of the seizure, had at least a security. This has certainly been so decided with reference to the 6 Geo. 4, c. 16, § 108. But I do not see what it proves. The security may be vested and certain, or it may be contingent and defeasible. It does not necessarily import present property, nor even beneficial interest. If tenant for life without impeachment of waste, or tenant in tail, sell trees standing and growing on the land, which he may lawfully do, the vendee, in common language, might be said to have a security for the money which he has advanced, but if the vendor should die before the trees are severed from the soil, the right of the remainder-man or issue in tail steps in and defeats that of the vendee. So here, although the judgment creditor had a security, yet still it was a possible case — I say no more at present — that a *jus tertii* might interpose and destroy it.

This brings me to the consideration of the second branch of the question, namely, whether the extent in this case at the suit of the Crown constituted such a *jus tertii*. It is perfectly clear, that at common law the King had very
 * 121 peculiar prerogatives, much beyond * the common right of a subject, for the recovery of his debts. Of these (not to mention others which are not to the present purpose) one was, that “where one was indebted to the King and likewise to other persons, the King’s debt was to be preferred in payment, that is, the King was to be paid before any other creditor of the party,” and, consequently, to be preferred in an execution. 2 Madd. Exch. 183, c. 23, § 7. The general rule is, and this has been acknowledged in all the cases, that when the right of the King and that of a subject concur, that of the King shall prevail; see the instances put in, *The Attorney-General v. Andrew*, Hardress, 23; Plowden, 258, 259, 264. But in ancient times the law of prerogative went further than this, and provided the most effectual means of security that the King’s title should always be the first. It prohibited the creditors of a King’s debtor even from taking out execution until all the King’s debts were satisfied, although the King’s debts were the later in point of time; and if the King’s debtor, notwithstanding, was sued or attached, the King

had a remedy by a writ of protection to protect his debtor. Co. Litt. 131 *b*; Fitz. N. B. 65, 66, tit. *Protection*; *The King v. Cotton*, Parker, 125. A King's debtor could not make a will to dispose of his chattels to the King's prejudice, nor could his executor have administration without permission from the King or justices or barons of the Exchequer, upon giving security to answer the King's debts; see numerous precedents in Maddox's Exch. c. 23. These prerogatives have at different times been controverted and regulated by statutes, but these very statutes testify their existence. Thus in the Statute of Magna Charta, 9 Hen. 3, c. 18, it is enacted, that if any holding of the King a lay-fee do die, and the sheriff show the King's letters-patent of his summons *for *122 debt, which the dead man did owe to the King, it shall be lawful to the sheriff to attach and enrol all the goods and chattels of the deceased being found in the lay-fee to the value of the debt, so that nothing thereof should be amoved until the debt be paid off, and the residue should remain to the executors to perform the testament of the deceased. Again, the Stat. 25 Ed. 3, c. 19, after reciting, that forasmuch as the King had before that time made protections to divers people which were bounden to him in some manner of debt, that they should not be impleaded of the debts which they owed to others till they had made *gree* to our Lord the King of that which to him was due by them by reason of his prerogative, and so during such protections no man hath sued nor durst implead such debtors, enacts, that notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's Court by their debtors, and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till *gree* be made to the King of his debt, and if the creditors will undertake for the King's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due and adjudged to them, and also shall recover against them as much as they shall pay to the King for them. After the passing, therefore, of this statute, which considerably abridged the ancient prerogative, although a

subject might pursue his debtor to judgment, yet he could not sue out execution until the King's debts were paid or secured. The King being entitled to the first execution, this execution, it is material to recollect, at the common law, was against the body, the lands, and the goods of the accountant or the King's debtor: *Sir William Harbert's Case*, 3

* 123 Rep. * 12, *b*; the words of Lord COKE on this point are:

"It was resolved, that at the common law the body, the land, and the goods of the accountant or the King's debtor were liable to the King's execution, for 'Thesaurus regis est pacis vinculum et bellorum nervi'; and, therefore, the law gave the King full remedy for it; and therewith agrees 5 Eliz., Dyer, 224, and Plow. Com. 321. *Sir William Cavendish's Case*, who was treasurer of the chamber, 24 Ed. 3; *Walter de Chirton's Case*, and infinite precedents in the Exch., to prove, that for the King's debt the body and the land of the debtor shall be liable by the common law before the Statute of 33 Hen. 8, c. 39." The statute did not give to the Crown this triple remedy; and whether it could be pursued, as now, by one single process, or must have been separately worked out by different writs, is a matter of no moment. Thus stood the law until the Statute 33 Hen. 8, c. 39, passed; and upon this short statement there seems to be no doubt, that if no alteration of the law in this respect was made by that statute, the King in the present instance is entitled to preference under the extent, although it did not reach the sheriff until the *feri facias* was partly executed by seizure; for it would be absurd to hold, that when it was unlawful to issue any execution before the King's debt was paid, the creditor, by his disobedience to the law in suing out an execution, should gain an advantage over the King. Then has the Statute 33 Hen. 8, c. 39, altered the law in this matter? That statute, sec. 74, enacts, that if any suit be commenced or taken, or any process hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons, and that our said Sovereign Lord, his heirs

* 124 and successors, shall have the first execution * against any defendant or defendants of and for his said debts

before any other person or persons, so always that the King's said suit be taken and commenced, or process awarded for the said debt at the suit of our said Sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons. It has been very properly observed by Lord Chief Baron MACDONALD, in his judgment in the case of *The King v. Allnutt*, 16 East, 280, 281, n., that, according to the construction put upon this clause in the cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, it must have the effect of postponing the King's execution, though it should happen to be prior both in *teste* and delivery to the subject's execution on his prior judgment, which would be putting the Crown, as to its execution, upon a worse footing than a subject, inasmuch as between subject and subject the priority of the delivery of the writ of execution always determines the question of preference, without regard to the priority of the judgment. Such a result surely could never have been intended; and this goes some way to show that the construction animadverted upon is not the right one. But I am of opinion, upon other grounds, that this section of the statute has been misunderstood. The first branch declares generally, that the King's suit and process shall be preferred before the suit of any person or persons. This seems to be distinct from the latter branch, which confirms the right that the King had before this statute, of having the first execution, not a preference where there are two concurring executions, one at the suit of the King, but the first execution, that is, the sole and exclusive execution, against any defendant for his debts before any other person. Then comes the condition or proviso, "so always that the King's said suit be taken and commenced or process awarded before * judgment given * 125 for the said other person." Now I take this sec. 74 to be a supplement to chap. 19 of the 25th Ed. 3, and the judgment mentioned herein to mean judgment obtained by favour of the latter statute. Then the meaning will be this, where the subject has obtained no judgment, the King is entitled, as of course he must be if he sued out process, to the first execution. But if the subject has obtained a judgment before any process sued out by the Crown, the execution thereof shall

not be divested by Stat. 25 Edw. 4, c. 19, but be put in suspense till *gree* be made to the King of his debts; but in such case he is at liberty to follow it up by execution, although the King's debt be not paid, and if he can get his execution completely executed before the King's process be sued out, he will be safe, for the King is only to have absolutely the first execution where the King's suit is taken and commenced, or process awarded, before judgment given for the other person. By this construction the greater difficulties, in my humble judgment, will be overcome, though perhaps some may remain; and this will account for the disuse of protections afterwards, which would be unavailing when the King had no longer a right in all cases to the first execution.

So much by way of argument from the account we have in our books of the ancient prerogative, and from the statutes. The cases that have been decided upon this question have been so often cited, that it is unnecessary to go through them all; I will only observe, that the weight of authority appears to me to preponderate very considerably in favour of the right of the Crown. The course of decision in the Court of Exchequer has been uniformly, with the exception of *The Attorney-General v. Andrew*, Hardr. 23, and Mr.

Baron Wood's opinion in *The King v. Giles*, on that * 126 side; and * considering that this is the King's great court of revenue, in which the Judges are more particularly conversant with these matters, this consistency of judgment ought to carry great weight with it. In *The Attorney-General v. Andrew*, the reasons assigned by the Judges are extremely short, and in truth consist only of two: the one, that the Statute 33 Hen. 8 abridges the prerogative and controls the common law, and that the words in the 74th section make a condition precedent, and imply a negative; the second, that there the subject's title was prior to the King's, and was executed. I have already explained why, in my opinion, the interpretation that has been made of this statute is an erroneous one, and why this statute does not affect the present case. With respect to the holding that the subject's title was executed if liberates had issued upon the elegits, which does not appear to have been the case, there is no

doubt but that this was so ; but if nothing more had been done than extending the lands upon the elegits, I take the liberty of saying, that the subject's title was not executed, and for this *Stringefellow's Case*, Dyer, 67, b, 3 Ed. 6, is my authority. In that case, Stringefellow had issued out a writ of *extendi facias*, to have execution of a statute staple ; the sheriff made extent of the defendant's lands, and seized them into the King's hands, but did not make livery ; and afterwards a writ of the King's prerogative, issued out of the Exchequer, reciting the prerogative which the King ought to have to be first served and paid by his debtors, and commanded the sheriff to levy the debt of the goods of the debtor, and if he had not sufficient, then to extend his land. This writ was delivered to the sheriff after the day of the return of the first writ, but before the first writ was returned. On the sheriff returning to the King's writ that the *debtor had no goods or lands to be extended besides *127 the goods and chattels, lands, and tenements above extended, and therefore, as to the further execution of that writ, he had done nothing, it was holden in the Exchequer for law, that the sheriff should be amerced if he would not amend his return, namely, return the extent into the Exchequer for the service of the King's debt ; and Justices HALE and BROMLEY were of the same opinion, because the property of the goods and land was not in Stringefellow before they were delivered to him by the writ of *liberate*. This case has always been acknowledged for good law ; and although a query is subjoined by the reporter, because the goods, on being seized into the King's hands to be delivered to the party, were in the custody and consideration of the law, and privileged from all other executions, yet this doubt proceeds from not attending to the distinction between the King's case and that of a common person. In the case of a subject, goods distrained or seized in execution cannot be again taken for that reason, but it is otherwise in the case of the King : *The Attorney-General v. Capell*, 2 Show. 481 ; see also the note by MANWOOD, Chief Baron, in Margin, Dyer, 67, b.

The cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, appear to me to have been determined on wrong principles.

Little research seems to have been made, in either, into the nature and extent of the royal prerogative at common law ; in the first, the judgment proceeded principally on the Statute 33 Hen. 8 ; and in the latter, on the mistaken assumption that the property was changed by the delivery of the writ to the sheriff. With all my respect for the learned Judges by whom these cases were decided, and no one can have greater,

I cannot assent to them, and I say this with the more
 * 128 freedom, because on no less than three * solemn occasions the Court of Exchequer has subsequently testified a similar dissent. The case of *Thurston v. Mills*, 16 East, 254, is no authority either way, because, although the Court intimated they had formed an opinion on the point, it was not divulged. With these exceptions, the determinations of the Courts will be found from the earliest times to have been in favour of this prerogative ; I therefore humbly give it as my opinion that the first question propounded by your Lordships should be answered in the affirmative.

With respect to the second question submitted to the Judges, as to any difference whether the writ of extent be in chief or in aid, I am of opinion that in this respect there is no difference between an immediate extent and an extent in aid. It appears to have been the practice in very ancient times, that if the King's debtor was unable to satisfy the King's debts out of his own chattels, the king would partake himself to any third person who was indebted to the King's debtor, and would recover of such third person what he owed to the King's debtor, in order to get payment of the debt he owed to the Crown, 2 Madd. Exch. p. 189, c. 23, § 8. In like emergencies, the King's debtors or accountants were wont to have writs of aid whereby to recover their debts of such persons as were indebted to them, in order to enable them to answer the debts they owed the King. Many precedents of both modes of proceeding are cited by Maddox in the notes, c. 23, §§ 8 and 12. One of them is in the fifth year of Rich. 1, in the great roll whereof it is stated, that Henry de Cornhill owed the King 100*l.* for the arerage of the cambium of all England except Winchester, and 6*l.* for the fenne of the land of Engelran de Musterel. And William Earl of Alber-

marle acknowledged before the barons of the Exchequer that he owed so much *to Henry de Cornhill, and *129 thereupon William Earl of Albemarle was charged, as debtor to the King, with the said respective sums. Others are of the reign of Hen. 3 and Edw. 1; in some of them the mandate is to the sheriff to distrain a former sheriff, or to aid collectors and assessors in distraining persons indebted to the King for aids or the like, and therefore are not properly extents in aid, the process being against persons originally indebted to the Crown; but in some instances, as in those of the executors of Hubert de Burgh, Walter de Walford, and the executors of the late Bishop of Hereford, the mandate to the barons is, that they distrain the debtors of those particular persons, in order that the King may be satisfied the debts which they owe to him respectively according to the law and custom of the Exchequer. This process, though now called an extent in the second degree, is in principle the same as that called peculiarly an extent in aid, the only difference being, that in the one case the Crown is the real as well as the nominal plaintiff; in the other, the process is sued out for the recovery of the debt due to the King's debtor and for his benefit. It is clear, therefore, from these authentic records, that the practice of charging the debtors of a person indebted to the King for the King's debt goes back as far as the period of legal memory, and the process has been gradually moulded into its present shape, and limited to its present extent, by statutes and by the rules and decisions of the Court of Exchequer.

I am of opinion, therefore, that it makes no difference whether the writ of extent was in chief or in aid.

MR. BARON VAUGHAN.— After much consideration devoted to the question which your Lordships have been pleased to propound to the Judges, I am of opinion *that the *180 writ of extent issued by the Crown, under the circumstances stated, ought of right to supersede the subject's execution.

During the progress of this inquiry my mind has been agitated by doubts suggested by a review of the conflicting judgments which have been pronounced in the superior

Courts of Westminster Hall upon this long-controverted question, involving a claim to exercise an important prerogative of the Crown on the one part, and a valuable civil right of the subject on the other.

The arguments in favour of the plaintiff in error may be resolved into the following propositions:—

First, That no prerogative right existed in the Crown by the common law to issue an extent whereby the goods and chattels and lands of the King's debtor might be extended, and his body seized, to enforce the payment of his debt.

Secondly, That, admitting the existence of such prerogative right under the common law, it was restricted and controlled by the Statute 33 Hen. 8, c. 39, so as to prevent its operation in the case *sub judice*.

Thirdly, That, independent of all prerogative right, after an actual seizure of the sheriff under a *feri facias*, at the suit of a judgment creditor, the property in the goods taken became thereby altered, no longer continuing the property of the debtor, and consequently no longer amenable to the process of the Crown.

Fourthly, That the sheriff acquired by the seizure such a special property in the goods as to deprive the Crown of any benefit to be derived from this process of extent.

The main question depends upon the true construction of the 33 Hen. 8, c. 39, § 74; but, in the interpretation of this statute, the important preliminary inquiry presents itself, viz., whether before, and independent of, any legisla-

* 131 tive enactments, the Crown was * not entitled by the common law to extend the lands and to take the body, as well as the goods and chattels, of the King's debtor in satisfaction of the debt. Sir EDWARD WEST, in his "Treatise upon the Law and Practice of Extents," states (but, as I conceive, erroneously), that the Crown derived its power of issuing an extent from the provisions of this statute. In page 108, he observes, that "this statute gave to the Crown a new kind of execution for all its debts; a species too of execution, which before that statute was the subject's execution, and the subject's only;" and in page 110 he repeats "that the subject's process by extent being imparted to the

Crown, the Crown will of course have the same rights in the use of that process as the subject."

The author of that treatise seems to have been betrayed into this error by what I would rather call an equivocal, than an inaccurate, expression of Lord COKE in his Comment upon the 8th cap. Magna Charta, 2 Inst. 19, which contains the following passage: "After the Statute 33 Hen. 8, c. 39, was made for levying the King's debts, the usual process to the sheriff at this day is, 'Quod diligenter per sacramentum,' " &c. From the words, "after the statute," Mr. West infers that the King was not empowered, by virtue of his prerogative at the common law, to issue any writ of extent to enforce the payment of his debts before that statute, such authority being created and conferred, for the first time, by the provisions of that Act. Lord Chief Baron GILBERT understands this expression of Sir EDWARD COKE's, "after the statute," &c., in the same sense, although he suggests a doubt respecting its accuracy; for in page 127 of his "Treatise on the Court of Exchequer," after transcribing a process known by the name of the Long Writ, he observes: "My Lord COKE says this writ was made since * the statute, but of this * 132 I have great doubt, because it seems so contrived that an inquisition should be found whether the debtor had any goods or chattels, and if, upon inquisition, there were none found, then to extend the lands and to take the body of the debtor. So that it seems this writ might have been used before the Stat. of Hen. 8, without any violation of Magna Charta, for if it were found that the debtor had no goods, they might seize the lands and take the body; and therefore it seems to be a writ that was used upon motion to the Court, and in cases of necessity, before the Stat. of Hen. 8; but since that statute they may have a *capias levare*, or extent, without any such inquisition touching the goods." The opinion of Sir E. COKE appears to me to have been misapprehended. I do not understand him to affirm that the King had no power of issuing an extent for the levying of his debts before the statute, but that the particular writ of which he gives only a partial extract had been the usual process to the sheriff since that statute, and was so at that day. Indeed,

the very first passage in the 8th chap. of Magna Charta, upon which he is commenting, "Nos vero vel ballivi nostri non seziemus terram aliquam vel redditum pro debito aliquo quamdiu catalla debitoris præsentia sufficient ad debitum reddend et ipse debitor paratus sit inde satisfacere," was introduced in ease of the subject, for the purpose of restraining the power of the Crown, and correcting an abuse of the prerogative, by preventing the seizure of the lands and rents of the Crown debtor, where goods and chattels could be found sufficient to satisfy the debt. Lord COKE observes upon this passage, that "by order of the common law, the King for his debt had execution of the body, lands, and goods of the debtor," and adds, "this is an act of grace, and restraineth the power the King had before." Both the text and the comment, therefore, conspire to prove that

* 133 * Lord COKE could never intend to ascribe the origin of the process of extent to the Stat. of Hen. 8: indeed, the reports of that eminent lawyer are replete with resolutions confirming the prerogative right of the Crown to issue process of this description from the earliest times. I will cite one case only from his reports in proof of this position, *Sir William Harbert's Case*, 3 Rep. 12 b. It was there resolved, that at the common law, the body, the lands, and the goods of the King's debtor, or accomptant, were liable to the King's execution; for that "thesaurus regis est pacis vinculum et bellorum nervi," and, therefore, the law gave the King the full remedy for it; and therewith agrees the 5th Eliz., Dyer, 224, and Plow. Com. 321 a; *Sir William Cavendish's Case*, 24 Ed. 3; *Walter de Chirton's Case*; and infinite precedents in the Exchequer, to prove that for the King's debt the body and land of the debtor shall be liable by the common law before the Statute 33 Hen. 8, c. 39. I have before observed, that Lord COKE gives only a partial extract of the usual process which he states to have issued since the Statute 33 Hen. 8. If the whole of it had been inserted, it would have appeared from the concluding part whether it issued from the office of the King, or of the Lord Treasurer's remembrancer.

The long writ introduced and commented upon by Lord

Chief Baron GILBERT, in the chapter in which he expresses his doubts respecting the accuracy of Lord COKE as to the period of time when that species of process was first issued for the purpose of securing the King's debts, was undoubtedly a writ from the office of the King's remembrancer, as appears from the concluding part of it, containing an injunction not to sell until the further order of the Court; from the bonds remaining in the custody of the King's remembrancer; and * from its referring in distinct terms * 184 to the Stat. 33 Hen. 8, as the authority from which it emanated, and being also signed by Masham, who was at that time an officer, not in the Lord Treasurer's, but in the King's remembrancer's office. Without professing to have examined the infinity of precedents to which Sir EDWARD COKE alludes, the searches I have made have satisfied my mind, that from that department of the revenue office in the Court of Exchequer under the control and management of the Lord Treasurer's remembrancer, a strong prerogative process or writ, combining in effect the *feri facias*, the *levari facias*, and *capias corpus*, has, from the earliest times, been issued upon special application, founded upon the necessity of the case, without any previous summons or notice, and directed at once against the goods and chattels, lands and tenements, and body of the Crown debtor, to levy all such debts as, by being charged upon the revenue rolls in that office, were become in the nature of recorded debts or duties. The more ordinary and usual course of proceeding was to transmit them to the Pipe office, and enter them upon the roll annexed to the summons of the pipe, to be levied by that process; and if returned *nihil* by the sheriff, to introduce them into a schedule, as described by Lord Chief Baron GILBERT, and send them into the office of the Lord Treasurer's remembrancer, to be levied by the general prerogative process, or long writ, which issued periodically, at two stated seasons of the year, for the recovery of all such debts. I will not abuse your Lordships patient attention by stating the reasons which have led me to conclude that Lord Chief Baron GILBERT may have confounded the long writ issued from the office of the King's remembrancer, under the author-

ity of the Statute 33 Hen. 8, with the long writ, which
 * 135 it has been * immemorially the course of the Court
 of Exchequer to issue from the office of the Lord
 Treasurer's remembrancer. It may be sufficient for the pur-
 pose of the present inquiry to take it, upon the authority of
 so eminent a judge, who presided at the head of the Court
 of Exchequer, that long anterior to the Statute of Hen. 8,
 such debts of the Crown as were entered on the great roll in
 the Treasurer's remembrancer's office might be levied by a
 process having the force and virtue of an immediate extent.
 I would, therefore, conclude my observations upon this first
 branch of the inquiry with a passage from Lord Chief Baron
 GILBERT'S "Treatise on the Court of Exchequer," p. 90:
 "An extent of a later *teste* supersedes an execution of the
 goods by a former writ; because by the King's prerogative
 at common law, if there had been an execution at the sub-
 ject's suit, and afterwards an extent, the execution was
 superseded until the extent was executed, because the pub-
 lic ought to be preferred to private property."

I proceed to the second branch of the inquiry, how far the
 Statute 33 Hen. 8, c. 39, restricts or controls this prerogative.
 In considering the legal operation and effect of such of its
 clauses as have relation to this question, we should remember
 that it was passed at a period of time when that monarch
 was in the plenitude of his power, when the revenues of the
 Crown had been recently greatly augmented by the sur-
 render and dissolution of the abbeys and monasteries, and by
 the daily increasing commerce and prosperity of the kingdom;
 nor can we forget, that the history of that reign records
 more frequent examples of sacrifices extorted from his sub-
 jects than of any voluntary surrenders of his acknowledged
 prerogatives to them. Upon the first forty-nine sec-
 * 136 tions of this statute, relating * to the erection of the
 court of surveyors of the King's lands, its officers,
 and their authority (all which have long since ceased to
 exist), it becomes unnecessary to make any observations.
 The object of the legislature in the six consecutive enact-
 ments, from section 50 to 56 inclusive, was the more speedy
 recovery of debts due to the Crown upon obligations and

specialties, which not being (before that Act) enrolled of record, were not amenable to the strong prerogative process of extent. The statute, therefore, gave them the force and effect of obligations acknowledged, according to the statute staple at Westminster. It gave also to the King his costs, as to a common person. It gave to each of the several Courts, as well to those recently erected as to those already existing, and mentioned in the 55th section, the same coextensive power and authority to commence and prosecute suits for debts and duties grown due to the Crown in respect of obligations remaining in each of those several Courts and offices, and to hear and determine them, and to award execution upon the body, lands, and goods of the parties condemned therein. But it appears to me a fallacy to suppose that, because it directed in what offices and Courts (some of those Courts being then recently erected) the suits should be commenced, and what process might in their discretion be used (mentioning *inter alia*, *capias*, *extendi facias*, &c.), therefore the power of issuing such process was given, for the first time, to the Court of Exchequer. As applied to obligations and specialties, which before that statute were matters in *pais*, not yet ripened into matters of record, I admit they were not liable to the immediate extent until rendered mature for that process by becoming enrolled of record. The sections to which I have referred, from 50 to 56, appear to me exclusively applicable * to the debts and duties accruing in respect of the * 137 obligations and specialties mentioned in those sections.

Section 57 enlarges the jurisdiction of the several Courts therein enumerated; extends their authority to a variety of other subjects having no relation to the present inquiry; and after introducing various regulations respecting the offices of receiver, auditor, accomptant, &c. (imposing penalties upon them for the breaches of their respective duties), the statute proceeds to enact the 73d and 74th sections, the last of which gives occasion to the present question. The 73d section directs, that in all actions and suits for the recovery of any debts which shall accrue to the King by reason of any attainder, outlawry, forfeiture, or gift of the party, or by any other collateral way or means, it shall be sufficient to declare gen-

erally, without showing the circumstances at large, according to the due order of the common law. Then follows immediately the much controverted 74th section. The first branch of this clause, introducing the proviso, contains a plain declaration of the King's prerogative right, under the common law, by which he was at all times entitled to have his suit preferred, and to have first execution. The proviso was undoubtedly intended to ingraft some qualification or restriction upon that right, or at least to confer a privilege upon the subject; and the question arises, as to the extent of that restriction or privilege. By Stat. 25 Ed. 3, c. 19, the subject (notwithstanding the King's ancient prerogative of granting writs of protection) was empowered to implead his debtor, and to proceed to judgment, with a stay of execution until the King's debt was satisfied: and it seems to me that this further privilege was granted by the 74th section of 33 Hen. 8, c. 39, viz.,

that he should no longer be restrained from proceeding
 * 138 to issue an execution in those cases to which * that section applied, viz., in which the Crown had neither commenced any suit nor awarded any process before his judgment was obtained. The legislature did not, I conceive, intend to interfere in any cases of conflicting or concurrent executions, but simply to remove the restraint continuing upon the subject at the time of the passing of the Act of the 25th Ed. 3, and to permit him to sue out execution without being guilty of any violation of the law, which before the Stat. 33 Hen. 8 he could not do. The section being silent as to which execution shall be first satisfied, imports only (according to my view of it) that the subject's execution may first issue, still leaving the prerogative right of the Crown to issue an extent unimpaired.

Supposing this to be the true construction of the statute, to what suit of the Crown does this 74th section extend? Does the proviso or condition control and override all the preceding clauses in the Act, or is it confined and limited in its operation to the subject-matter of the 73d section immediately preceding? This question is involved in some obscurity. The collocation of the sections would favour the latter and more limited construction, but the words in the 74th section

are sufficiently general and comprehensive to embrace other debts than those designated in the 73d section as accruing to the King by "attainder, outlawry, forfeiture, or gift of the party, or by any other collateral way or means." At the same time, if the restriction be construed to apply to every species of Crown debt, so as to include the obligations and specialties mentioned in the 50th section, it would involve the difficulty, nay absurdity, of supposing that an Act of Parliament, passed for the professed purpose of facilitating the speedy recovery of the King's debts, by giving them the force and effect of a statute staple, would, instead of

* expediting their payment, place the King in a more * 139 unfavourable position than any of his subjects. In every case between subject and subject, the point of time to determine the priority of execution is not the moment in which judgment is obtained, but that in which the execution is delivered to the sheriff; whereas the construction contended for by those who impugn the preferable title of the Crown would give to the subject, in possession of a judgment, the power of postponing indefinitely the King's execution, unless there had been an inception of his suit, or an award of his process, before such judgment was signed. I interpret the word "debts" in this section (taking it with reference to all the previous provisions of the statutes) to mean such debts as, not being enrolled of record, are in *fieri only, unascertained, and remaining to be recovered* through the medium of a suit to be commenced, or "process to be awarded," inasmuch as informations for penalties always conclude with a prayer that process may be awarded. This construction would also embrace such debts as are mentioned in the immediately preceding section; and unless the Crown had in all such cases actually commenced the suit, or awarded its process, the subject, having obtained a judgment, might proceed to issue execution, and thereby, in obedience to the language of the proviso, prevent the King from having first execution, to which before that statute he was entitled. I do not, however, read the clause as prohibiting the Crown from issuing an extent under the circumstances stated in this case. I come next to consider the question, whether, after seizure by the sheriff under a *fieri*

facias at the suit of a judgment creditor, the property in the goods taken becomes thereby altered, so as to be no longer liable to the extent of the Crown? The Crown claims

* 140 to be entitled to priority in the execution of its * process by virtue of its prerogative. The subject denies the existence of any such prerogative, asserting, that after the execution has once begun by an actual seizure made, the Crown has no longer any right to intervene, the subject's execution from that time being entitled to the preference. Upon this question the Crown, as representing the public in respect of the revenue, and an individual creditor, in right of his private claim, are at issue. For the subject, the cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, and for the Crown, *The King v. Wells and Allnutt*, and *The King v. Sloper and Allen*, are relied upon as conclusive; and your Lordships are constrained to elect by which of these decisions you will abide, for no sophistry of argument can reconcile them. After the elaborate comment upon these cases, and upon all the authorities applicable to this subject, and upon the principles to be deduced from them, which your Lordships have heard from those who have preceded me, I shall state shortly the reasons which have determined me to prefer the latter judgments delivered by the Court of Exchequer, as containing the sounder exposition of the law, and as resting upon the more solid foundation. Any judgment pronounced by the Court in which Lord Chief Justice DE GREY presided, assisted by that great constitutional lawyer, Sir WILLIAM BLACKSTONE, by Mr. Justice GOULD, and Mr. Justice NARES, presents, upon the first view, the strongest claim to the concurrence of any English lawyer; but I must confess, after weighing the reasons assigned, and the authorities upon which the judgment of the Court of Common Pleas in *Uppom v. Sumner* professes to be founded, I cannot yield my judicial assent to it. The whole argument upon the Stat. 33 Hen. 8, as reported in 2 Sir W. BLACKSTONE's Reports, is com-

* 141 prised in this single observation, viz., * that the former part of the 74th clause is declaratory of the old prerogative law, and the latter a new restriction, so that it shall not take place after judgment given for the

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subject. The authorities on which this judgment proceeded are still more unsatisfactory. The case of *Lechmere v. Thorowgood*, as reported in Comberbach, 123, and 3 Mod. 236, is relied on as the prominent ground of the decision; which, together with *The Attorney-General v. Andrew*, Hardr. 23, and the passage extracted from Lord Chief Baron COMYNS' Digest, vol. 2, 538, viz., "if execution be upon a judgment against the King's debtor, and before *venditioni exponas* an extent comes at the King's suit, those goods cannot be taken on the extent," are referred to as comprehending the pith and marrow of the law embodied in this solemn judgment. As to *The Attorney-General v. Andrew*, Lord Chief Baron STEEL's judgment appears to have proceeded on the ground that the execution, which was an *eligit*, was perfect and consummated before the extent issued: Hardr. 27, he says, "the subject's title is prior to the King's, and is executed." And he adds, "*Stringefellow's Case*, in Dyer, is unanswerable." And as to the passage in Lord Chief Baron COMYNS' Digest, vol. 2, 538, I do not understand him as throwing the preponderating weight of his own great name into the scale to guarantee the credit of any decision where he cites cases to support it. Upon the authority, therefore, of the single case of *Lechmere v. Thorowgood*, admitted by Mr. Justice GOULD to be a little obscure, from being reported only piecemeal and in different books, is built the disputable, or, I would rather say, the untenable proposition, that after execution begun, but not completed, the King's extent comes too late. I have examined with care the several reports of this case in

* Comb. 123; 3 Mod. 236; 1 Show. 12, and 2 Vent. * 142 160, from which it will appear, that the action was trespass by the assignees of a bankrupt against the sheriff of London and others, for seizing goods under a *feri facias* against the bankrupt after an act of bankruptcy committed by him. The act of bankruptcy was committed on the 18th of April; the seizure was on the 29th. After the seizure, an extent issued at the suit of the Crown. The case was twice before the Court, once in Trinity term, 4 Jac. 2, of which 3 Mod. gives the account; and again 1 W. & M., to which Comberbach and Shower refer: "The Court were of opinion

a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time." The question, therefore, as to the right of the Crown to have the extent preferred to the execution, was not the point depending in judgment; and supposing Lord HOLT to have said what Comberbach imputes to him, viz., that the extent came too late after the *feri facias* delivered to the sheriff, it could be regarded only as an *obiter* and extra-judicial *dictum*. When the same question arose in *Rorke v. Dayrell* as in *Uppom v. Sumner*, Lord KENYON, after expressing his perfect satisfaction with that decision, relied upon this proposition as the basis of his judgment, viz., that as long as the property of the debtor remained *unaltered*, and an execution at the suit of the subject, and an extent at the King's suit, issue against the debtor, the title of the Crown must prevail; for the point to be considered is, in whom is the property? He then proceeds to state, that as the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the Crown can attach. With great deference to

* 143 the judgment * of so profound a lawyer, I venture to question the soundness of this opinion, preferring the doctrine of Lord HARDWICKE, in *Lowthal v. Tonkins*, 2 Eq. Cas. Abr. 382, who says: "That neither before the Statute of Frauds, nor since, is the property in the goods altered, but continues in the defendant until the execution executed. The meaning of these words, the goods shall be bound by the delivery of the writ to the sheriff, is, that after the writ is so delivered, if the defendant makes an assignment of his goods, unless in market overt, the sheriff may take them in execution." The same opinion was expressed by Lord HOLT, in *Smallcombe v. Cross and another*, 1 Lord Ray. 251, who says: "If writ of execution be delivered to the sheriff against A., and A. becomes a bankrupt before it be executed, the execution is superseded; and, consequently, the property in the goods is not absolutely bound by the delivery of the writ to the sheriff. But the *teste* of the writ binds against all sales and acts of the party himself." The same point was decided in *Phillips v. Thompson*, 3 Lev. 191. Lord KENYON,

in the judgment I am commenting upon, says, "the point to be considered is, in whom is the property?" I would try it by that test. If the property be not in the debtor after the seizure, and before the sale, I would ask, in whom is it? The debtor may, at any moment before the sale, pay the debt and demand the goods; nor is any bill of sale necessary to re-transfer the property in order to confirm his title. Suppose the goods, whilst remaining in the custody of the sheriff, to be consumed by lightning or destroyed by fire, or by an armed tumultuary force, would the execution be satisfied or the debt discharged? Surely not. The judgment of the Court of King's Bench, in *Thurston v. Mills*, 16 East, 254, furnishes a direct * authority on this point. * 144 Goods were taken in execution by the sheriff under a *fi. fa.*, and whilst remaining unsold, an extent at the suit of the Crown, of a subsequent *teste*, issued, under which the sheriff took them, subject to the former seizure, and afterwards sold them under a *venditioni exponas* from the Court of Exchequer. Money had and received was brought by the plaintiff in the original action against the sheriff for the proceeds of the sale. Lord ELLENBOROUGH, in delivering his judgment, observes, "neither the money nor the goods were originally, nor at the time of the action brought, the property of the plaintiff." The sheriff had indeed seized them under a *feri facias*, but the plaintiff acquired no property in them by the sheriff's seizure. If they had been burnt in the hands of the sheriff, the plaintiff would not have borne the loss. Lord KENYON concludes his judgment in *Rorke v. Dayrell*, in these words: "With respect to what is supposed to have been said by Lord MANSFIELD, in *Cooper v. Chitty*, of Comberbach having mistaken Lord HOLT's opinion in *Lechmere v. Thorowgood*, it is as probable that the report of that observation is mistaken." If Lord KENYON, before he delivered his judgment in *Rorke v. Dayrell*, had fortunately referred to his own note of *Cooper v. Chitty*, which has since been published by Mr. Hanmer, from his Lordship's original manuscript, instead of impeaching, he must have borne testimony to the accuracy of Sir JAMES BURROW's report of Lord MANSFIELD's judgment in that particular. The notes of Lord KENYON and

of Sir J. BURROW on this point are in such perfect harmony, that the one may be considered a *fac simile* of the other, and I will transcribe them. Lord MANSFIELD is reported by Sir J. BURROW to have said, "that Comberbach, in giving the judgment of the Court, which is the only

* 145 * sensible part of his whole report (for it is plain to me that he did not understand the former argument on the former day, which is the first part of his report of the case), agrees with Shower, and says, 'that the Court were of opinion that a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time;' but he must be mistaken in the first part of his report, for Lord Chief Justice HOLT could never say that the property of the goods is vested by the delivery of the *fi. fa.*, and the extent of the King afterwards comes too late. No inception of an execution can bar the Crown." The following passage is extracted from Lord KENYON's report of *Cooper v. Chitty*, as published by Mr. Hanmer, p. 422: "This case of *Lechmere v. Thorowgood* is reported in two other books: in Comberbach, 123, the latter part of the case is agreeable to that of Shower, that a construction should not be made to make the officer a trespasser by relation. As to the other part of the report, it is manifest to me that he did not understand what they were arguing about, for he makes Lord HOLT say, what he could never say, about barring the extent of the Crown. In 3 Mod. it is as plain that the reporter understood what passed, for he says that the extent came too late, and that the property was bound by the *fi. fa.*, though the contrary is very clear." The inference I draw from all the authorities upon the subject, whether the question be considered with regard to executions on statute staple, or to executions at common law by *fi. fa.* or *elegit*, is this, namely, that the extent of the Crown must be preferred if the execution be not perfectly executed by the delivery of the land to the cred-

* 146 itor, or * by the sale of the goods; that the inception of the execution by the bare seizure of the goods will not bar the Crown; that the execution must be no longer in progress, but completed; and that until the actual sale the property is not altered or divested from the original owner.

Mr. Baron WOOD, in the elaborate judgment delivered by him in the Court below, and reported in 8 Price, 314, seems, throughout his most able argument, to admit, that in order to exclude the process of the Crown, the execution of the subject must be executed. But he insists that the act of seizure by the sheriff is for that purpose a full and final execution. But neither the cases he cites, nor his reasoning to illustrate that position, have succeeded in making me a convert to his opinion. *Curzon's Case*, 3 Leon. 239; 4 id. 10, cited by that learned Judge, to show that the prerogative of preference is determined when the subject's final execution has begun, proves, on the contrary, as it appears to my mind, that it is not determined until the subject's execution was perfect and consummated by the delivery of the land to the creditor under the *liberate*. The only point remaining to be considered, namely, whether the sheriff acquired by the seizure such a special property in the goods as to defeat the process of the Crown, has been so fully discussed by my learned brothers who have preceded me, and to whose judgment I take leave to refer (more especially to my brother ALDERSON's) as illustrating my view and incorporating my opinion on that subject, that I willingly spare your Lordships the fatigue of attending to my examination of it in detail. That the sheriff is invested with power, as the ministerial officer of the law, to protect the property whilst remaining in his custody, for the benefit of those who may be entitled to it, cannot * be * 147 disputed. Against a wrong doer he may maintain trover or trespass; but from thence I apprehend no inference can be drawn unfavourable to the rights of the Crown. He may still be called upon to execute his Majesty's process of extent, subject to any legitimate claim of property in third persons previously existing and capable of being established. My brother ALDERSON has accurately defined the state and condition of such property as being *in custodia legis*. I will therefore dismiss this last head of inquiry with an observation of Lord HOBART's, extracted from his judgment in *Sheffield v. Radcliffe*, Hob. 339, when commenting upon *Stringefellow's Case*, 1 Dyer, 67, so often referred to. The passage is in these words: "Stringefellow sued an extent upon statute

staple against Brownesoppe. The sheriff of Bedfordshire extended the land and appraised the goods, and seized them into the King's hands, but before *liberate* an Exchequer writ for a debt of 100*l.* of the King's, to be levied upon Brownesoppe, came to the sheriff, who returned on the writ this special matter into the Exchequer, and he made the same return into the Chancery upon the *liberate*, and that there were no other goods; yet he was enforced, notwithstanding the custody of the law, to serve the King." For these reasons, I am of opinion, that the King's extent is entitled of right to be preferred to the subject's execution, and that there is no solid distinction to be made between an extent in chief and an extent in aid.

I fear that I have rendered myself obnoxious to the imputation of trespassing too largely upon your Lordship's valuable time. My apology for doing so may be found in the importance and difficulty of the subject, which has for so * 148 many years been considered in Westminster * Hall as *vezata questio*, distracting and dividing the opinions of the most enlightened judges. If the judgment which I have humbly submitted to your Lordships be deemed erroneous, I shall at least have the consolation of reflecting that I am under the shade of great authority, *Magno se judice quisque tuetur*.

MR. JUSTICE GASELEE. — My Lords, I have the misfortune to differ in opinion from those of my brothers who have preceded me, and I understand from a great majority of those who are to succeed me in addressing your Lordships upon this occasion; and when I consider that the two noble and learned Chief Justices, to whom this case was referred upon a writ of error brought to review a judgment which was given in the Court of Exchequer in favour of the defendant in error, reported to the Lord Chancellor that the question was one which has agitated the Courts of Westminster Hall for a great many years; that there had been a difference of opinion in the Courts of Westminster Hall, the Court of King's Bench in one case, and the Court of Common Pleas in another having decided that the extent was not entitled to priority over the execution at the suit of the subject; that

the Court of Exchequer has uniformly decided the other way, viz., that the extent was entitled to priority; and that their Lordships having heard the case argued, and considered it very maturely, had not been able to come to a decision upon the subject and agree upon what advice they should give to the Lord Chancellor; I am a little surprised that so considerable a majority of the judges should have formed an opinion adverse to that which is the result of the best consideration I have been able to give to the subject.

* The first question propounded by your Lordships * 149 for the opinion of the Judges, branches out into two; viz., first, whether the property is altered by the seizure of the sheriff under the writ of *fi. facias*; and secondly, whether the Statute 33 Hen. 8, c. 39, § 74, abridges the prerogative process of the Crown, and prevents it from taking effect, unless it be issued antecedently to the subject's execution, or, in the words of the statute, unless the King's suit be taken or commenced, or process awarded for the debt at the suit of the King, his heirs, and successors, before judgment given for the other person or persons. In considering the first of these questions, I would call to your Lordships' attention, that the question in this case is not, as in many of the cases in which the decision has been given in the Court of Exchequer in favour of the Crown, whether the claimant has such a property in the goods as to enable him, according to the technical practice of the Court, to come in and claim the property under the usual rule, upon the return of the writ and inquisition into the Court; in which case no one can be allowed to traverse the King's title without showing title in himself: but here the question is, generally, whether the writ shall be executed by the sheriff, by extending the same goods into the King's hands and selling them to satisfy the Crown debt, without regard to the *fi. fa.*, under which he had first seized them. It is admitted, and indeed after the decision in *Swain v. Morland* (1 B. & B. 370; 3 B. Moore, 740), it is too late to deny, that after an execution is once executed at the suit of a subject, an extent coming to the sheriff on the part of the Crown to be executed on the same property, comes too late. One question, therefore, on this case is, at

what time may an execution be said to be executed?

* 150 Now, my Lords, there are many authorities which lay it down, that by the seizure (the sale being but the formal part of the execution), the property vests in the sheriff. The first authority I shall trouble your Lordships with on this point is the opinion of Lord HOLT, in the case of *Lechmere v. Thorowgood*, reported in several books, and amongst others in Comberbach, 123, in which Lord HOLT is stated to have said, "the property of the goods is vested by the delivery of the *fi. fa.*, and the extent afterwards for the King comes too late, and that on the Statute of Frauds and Perjuries." It is true the case does not appear to have been decided on that ground, but because the taking being lawful at the time, the officer could not be made a trespasser by relation; and that Lord MANSFIELD, in *Cooper v. Chitty*, says, that the reporter must be mistaken in the first part of the report. In 4 T. R. 411, Lord KENYON is stated to have said, with respect to what is supposed to have been said by Lord MANSFIELD in *Cooper v. Chitty*, of Comberbach having mistaken Lord HOLT's opinion in *Lechmere v. Thorowgood*, it is probable that the report of that observation is mistaken. But in the banker's case, 11 State Trials, 28, Lord HOLT says, as soon as a *fi. fa.* is delivered to the sheriff, and upon it goods are levied, the property of the goods is altered, and the sheriff becomes the debtor to the plaintiff. The case of *Clerk v. Withers* is also to the same effect. That case is as follows: F. Dives, as administrator of J. Dives, recovered 303*l.* against Clerk, upon a bond to his intestate, upon judgment by default in the Common Pleas, and sued out a *fi. fa.* tested of Trinity term, 1 Ann, returnable in Michaelmas term, directed to the sheriffs of London, which was delivered to the sheriffs on the 1st August in the same year, who on the same 1st

* 151 August seized goods to the value. F. Dives, the administrator, died 9th September following. The sheriff returned the seizure to the value "sed remanent, &c., pro defectu emptorum." On the 29th September, the sheriff was removed and another put in. Defendant Clerk now sued out a *sci. fa.* against the then sheriff for restitution of his goods, and, upon demurrer, judgment was given against the

plaintiff in the Court of Common Pleas, and he then brought a writ of error ; and now the case having been twice solemnly argued at the bar, the Court *seriatim* affirmed the judgment. Mr. Justice GOULD says, "the execution is executed in the life of the administrator, and the sale, namely, the formal part of it, may be done by the same writ. The sheriff, by the levying of the goods by a *fi. fa.* as he seizes the goods, gets a property in them against all persons, and may have trespass against the true owner, if he gets them ; and so he may have trover, as appears in *Wilbraham v. Snow*, where Chief Justice KELYNCE held, that he gains a general property ; but all the rest say that it was only a special property, so as to sell, &c. This is not like the case put before, of an extent ; for in that case there must be a *liberate*, which is by award of the Court. Mr. Justice POWYS says, "this execution is so far completed, that it is a vesting of the property in the sheriff. The selling is but a formal part of the execution, and by the seizure and writ, he has authority to sell ; and the *venditioni exponas* adds not to his authority, but is to spur him on to sell." And Mr. Justice POWELL says, "execution is an entire thing ; and, therefore, where a sheriff levies goods, and while they remain in his hands for sale, a new sheriff is chosen, he who begins the execution shall go on with it and sell the goods, and not deliver them over to the new sheriff, who is the officer of the * Court. The reason is, that execu- * 152 tion is one entire thing, Year Book, 34 Hen. 6, pl. 36 ; and, therefore, where it began it shall end, and that is the reason that a supersedeas after execution begun shall not supersede it upon error, because it is an execution from the first levying of the goods, and not like the case of an *extendi facias*, because the extent is only a seizure into the King's hands, and there must be another award of the Court, namely, a *liberate* to deliver them over to the plaintiff." By HOLT, Chief Justice : "It is true, after he has seized goods to the value of the debt, though he be out of office, yet he is bound to make sale of the goods and to make a return ; and when he has made a return of the seizure of the goods, and that they remain in his hands for want of buying, that is not a discharge of the command of the writ, but only an excuse that

he has not the money, and he is compellable by law to bring it in; and though a *venditioni exponas* does lie, yet a *distringas* is the proper remedy; and there are two sorts of *distringas nuper vicecomitem*, before mentioned, Year Book, 34 Hen. 6, pl. 36. The one a *distringas* to the new sheriff to distrain the old one, to sell the goods, and bring the money into court; the other to distrain him to sell *et denarios inde provenientes*, to deliver to the new sheriff to bring into court. Now, if a *distringas* lies to the new sheriff to compel the old sheriff to sell, that shows the old sheriff has an authority to sell by virtue of the former writ; and that which commands the new sheriff to distrain, the old one to sell and bring in the money, is the most usual, Rastell's Entr. 164; Thes. Brev. 90. Now, then, since the sheriff is compellable to sell, having seized the goods, what should hinder, in this case, that he should not sell,

* 153 * notwithstanding the plaintiff's death; for the writ is as forcible and compellable upon him to levy and bring in the money as if the plaintiff had lived. When he seizes the goods by virtue of the writ, the defendant is actually discharged, though they are not sold, for the plaintiff must depend upon his execution, and rely upon that; he has no further remedy against the defendant, but altogether against the sheriff. This came in question upon an ejectment brought by an administrator *de bonis non*; and it was held, that the extent was void, for the writ was abated, and no matter whether the plaintiff died before the return of the seizure or after. But in case there be no act of the Court to be done, but an *elegit* sued out, which commands the sheriff to deliver the lands extended to the party; if, there, the executor or administrator die after the inquisition and before the delivery, in that case the death of the plaintiff shall not avoid the execution; and that appears by the case of *Harrison v. Bowden*, though not so very plain." If he do not sell between the *teste* and return of the *distringas*, he shall forfeit issues; and after goods once seized, no writ of error or supersedeas shall stay the sale. In *Wilbraham v. Snow*, the point was, that the sheriff may maintain trespass or trover against any person who takes away goods which he has seized in execution, *Mildmay v. Smith*; and by seizure of the goods in exe-

cution, the sheriff has property in them, so that he may reseize them, and sell when he is out of office as before. In the case of a *fi. fa.* there is no further act to be done. Although the terms of the writ direct the sheriff to bring the money into Court to render to the plaintiff, it is not necessary he should do so. He not only may pay it over himself to the plaintiff, but in the case of * *Parkinson* * 154 v. *Guildford*, it is said an action of debt may be maintained against him or his executors if he does not do so after he has sold the goods. It is true that authorities have been cited on the other side, and amongst others, *The King v. Peck* (Bunb. 8). In that case a *fi. fa.* issued out of the Court of Common Pleas at the suit of *Robarts v. Peck*, which was tested 3d of April, by virtue of which the sheriff levied the goods, &c., but before the sale thereof, or the return of the writ, an extent came to the sheriff at the suit of the Crown, to levy the goods, &c., of Peck, tested 2d of May. The sheriff returned this special matter on the *fi. fa.*, and likewise upon the extent, into the Court of Exchequer, on which it was said that Peck had possession of the goods the 30th of April, on which Mr. A. moved to quash the inquisition, and Mr. F. moved that the sheriff might amend his return. Baron PRYCE was for quashing the inquisition, which, being found by a jury, he did not see how the sheriff could amend it. The Lord Chief Baron BURY and Baron MONTAGUE were of opinion the sheriff might amend his return, and an order was made for that purpose, which was what the sheriff wanted to indemnify him, in case any thing had been moved against him in the Common Pleas on the return of the *fi. fa.* There is a note in that case in these terms: "Take notice, it was taken for granted, that though the goods were levied by virtue of the *fi. fa.* three days before the *teste* of the extent, yet there was no bar to the Crown; but *quære*, if they had been sold, for then execution had been executed." *Stringefellow's Case* has also been very much relied upon on this part of the case, as an authority on the part of the Crown. That case is thus reported in Dyer, 67 b. [The learned Judge here quoted the facts of that case]: "And it was *holden in the Exchequer for law, that the * 155

sheriff should be amerced if he would not amend his return, namely, to return the extent into the Exchequer for the service of the King's debt; and Justices HALL and BROMLEY were of the same opinion, because the property of the goods and land was not in Stringefellow before delivery to him by the writ of *liberate*." The distinction, however, between that case and the case of a *fi. fa.* has not only been very fully pointed out in the opinions of some of the judges of the case of *Clerk v. Withers*, above cited; but is also very pointedly observed upon by Mr. Baron WOOD, in the case now in judgment, in 8 Price, 314. It is, that the extent is not the execution, and gives no authority to the sheriff to sell or deliver over to the party; it merely authorizes the sheriff to seize the property, but not to do any thing with it until the *liberate* issues, which is in fact the execution. The *fi. fa.* commands the sheriff to make the money of the goods. No further authority is requisite to empower the sheriff to sell and to pay the money over to the plaintiff. This distinction is also shown in *Playne's Case*, in Cro. Eliz. 47. "A lessee for years was obliged to pay his rent. In debt upon it he pleaded that the lessor was bound in a statute, and upon that, an *extendi facias* was awarded to seize the lands and tenements of the lessor into the Queen's hands, which was executed accordingly, and upon that a *liberate* was awarded, and in the mean time between the *extendi facias* returned and *liberate* awarded, the rent was incurred, for which he was chargeable to the Queen, and demands judgment." The opinion of the whole Court was clear to the contrary. Before the *liberate* awarded *nihil operatur*, for he remains always tenant to the lessor, and chargeable to

* 156 him for his rent; and the writ before is but of * form, when it speaks of the seisin into the Queen's hands, for it is never seen that lands were seized upon that writ. So that here, upon an *extendi facias*, it is clearly held that nothing was divested out of the debtor until the *liberate*. In *Smallcombe v. Cross*, 1 Lord Raym. 251, which has been cited on the part of the Crown, there is the following note: "In this case, *Mr. Northey* said, *arguendo*, that it is the common practice at this day, that if a *fi. fa.* be delivered, and the goods

appraised and sold, and the writ is not returned, and an extent for the King comes out of the Exchequer, it will overreach the former sale; but, *per curiam*, it is a very dangerous practice." It is, however, now admitted, that the sale would bar the Crown; and I only mention this note to show how far the argument has in earlier times been carried in support of the alleged rights of the Crown. A passage at the end of the case of *The Attorney General v. Capell* was also cited on the other side, viz., "extents have been on goods actually levied by virtue of a *fi. fa.* and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." This passage does not appear to be part of the judgment of the Court in *The Attorney-General v. Capell*, in which the question was, whether the extent was too late coming after the commission of bankruptcy but before the assignment. There is nothing in the case wanting or in any way calling for the inference, which, as Mr. Baron Wood says in his judgment, is a mere *gratis dictum* of the reporter of that case.

The result of a due consideration of the foregoing cases seems to me to be, that the property is altered, and the Crown barred by the levy under the *fi. fa.* It is not necessary to go the length of showing that *the sheriff *157 has the general property in the goods. There are several cases which show that where the general property remains in the debtor, yet if another has any special property in or lien upon the goods, the Crown shall not take the goods but subject to that lien. Thus, an equitable mortgage which binds the Crown, and against which the Crown is entitled only upon satisfaction of the lien of the mortgagee to its full extent, *Casberd v. The Attorney-General*; or the lien of a factor, who has accepted bills to the amount of the value of the goods consigned to him, *The King v. Lee*; or of a wharfinger, on the goods of his customer in his possession for his general balance, which has been decided to be available against the Crown, *The King v. Humphrey*, 1 M'Cl. & Y. 173. Mr. West's Treatise on Extents, p. 98, says, the plaintiff in an execution may be said to have an interest in goods which have been taken under his execution, the goods being under

the custody of the law, and the sheriff having the special property in them, the general property remaining in the defendant under the execution. But it is said that that rule cannot apply to the case in question, because at any time before sale, and after the seizure, the debtor may, by payment of the debt, suspend the sale and stay execution. The same answer would apply to the case of the factor, wharfinger, and other persons above named, in all which the debtor, upon payment of the debt, regains the property.

If the decision on this part of the case is in favour of the plaintiff in error, the remaining question will not arise, but if not, I am of opinion that the Stat. 33 Hen. 8, c. 39, § 74, abridges the prerogative process of the Crown, and prevents it from taking effect in this case, the King's suit not having been taken or commenced, or process awarded at his

* 158 suit before * judgment on the *fi. fa.* The following are the words of that section: "And be it also enacted

by the authority aforesaid, that if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons, and that our said sovereign Lord the King, his heirs and successors, shall have first execution, so that the King's suit be commenced before judgment given for the said other person or persons." Before proceeding to the further consideration of this part of the case, I should call your Lordships' attention to the fact that, in the present case, so far from the King's suit being taken or commenced, or process awarded before the judgment was given for the other person, the debt was not due to the King but to the debtor of the King's debtor, and was not put on the record until after the giving the judgment, the issuing of the *fi. fa.*, and the actual seizure of the goods under it. In the case of *The Attorney-General v. Andrew*, it was determined by all the Court that the statute did abridge the prerogative. The case was, Sir William Harrison acknowledged two judgments in debt to one Andrew, upon bond, and was bound to one Feilder on a bond bearing date before the judgments. Feilder assigned his debt to the King, Andrew takes out execution upon his judgments, viz., two

elegits; by one he has the moiety, by the other the other moiety of Sir W. Harrison's lands extended. Then process issued out of the Exchequer for the debt assigned to the King, and the principal question was, whether or no the King should be preferred in this case? After argument, the Court, in Trinity term, 1656, gave judgment for defendant. Baron PARKER said: "The King has many prerogatives, *pro bono publico*, but in the case in question, the Statute 33

* Hen. 8, abridges the prerogative, and controls the * 159 common law; affirmative statutes do not alter the common law, but negative statutes do; and here is a negative implied, see *Stringefellow's Case*, in Dyer, 67 *b*; also *Lassel's Case*, in Dyer, 364." Baron NICHOLAS agreed, "before the Statute 33 Hen. 8, the King was not bound, but the statute has made an alteration, though it sounds in the affirmative, for it enacts a new thing, and *ita quod* makes a condition precedent and a limitation." He then refers to certain authorities, as showing how such statutes are to be expounded, and that the clause would else be idle. Chief Baron STEEL, "the subject's title is prior to the King's, and is executed; the words of the Statute 33 Hen. 8 are introductive, *Cecil's Case*, 7 Rep. 18 *b*, and *Stringefellow's Case*, are unanswerable." It is observable, that although so much stress is laid on *Stringefellow's Case* on the part of the Crown on this occasion, Chief Baron STEEL and Baron PARKER, in the above case of *The Attorney-General v. Andrew*, cite it as being conclusive in favour of the subject. The case of *Uppom v. Sumner*, 2 Blacks. 1251, 1294, is precisely the same as the present. Uppom, the plaintiff, in Easter term, 17 Geo. 3, recovered a judgment against Cann in the King's Bench, in debt, for 1020*l.*; and on the 16th of April, 1777, sued out a *fi. fa.* returnable on Monday next after the morrow of the Ascension, 12th of May; a warrant on which was, on the 18th of April, delivered to the officer, who on the same day took the goods, and kept possession of the same by virtue of the warrant. On the 24th of April, before any sale of the goods, an extent was sued out, and delivered to the sheriff, against the goods of Cann, to levy 621*l.* 4*s.* 9*d.*, a debt to the King; and a warrant was on the Monday delivered to the * same * 160

officer, who then had the goods in his possession under the former warrant, and who two days after had the goods appraised, and, on the 30th of April took an inquisition on the extent, the plaintiff Uppom's attorney attending and putting in his claim. The goods were sold on the 23d of May, and the sheriff being called upon by Uppom to return his writ, returned *nulla bona*. When the cause was first called on, the plaintiff's counsel thought they could not support their case, and accordingly judgment was given without argument. It was, however, afterwards argued, and, after time to consider, Mr Justice GOULD delivered the unanimous opinion of Chief Justice DE GREY, who was present at the argument himself, and Justices BLACKSTONE and NARES, that in this case the extent did not take place of the execution, the King's suit being commenced after the judgment. It had been contended in argument by Mr. Serjeant GROSE, who afterwards was one of the judges, and agreed with the rest of the Court in the judgment in *Rorke v. Dayrell*, that the Statute 33 Hen. 8 only restricts the prerogative in the particular revenue Courts erected by and mentioned in that Act. But in giving judgment, Mr. Justice GOULD, after stating the particular parts of the Act, says, about seven sections only, viz., sections 50, 74, 75, 76, 77, 78, and 80, contain general provisions, extending to all the King's subjects, and are applicable to all the King's Courts, as well as to the Courts of revenue, where the subject of them fall under consideration. Indeed, he says, it would have been absurd to have one law prevail in the King's Bench and Common Pleas and another in the Exchequer and Duchy, with regard to such questions as the present, the priority of the King's debts before those due to a subject. The learned Judge, after stating the 74th section * of the Act, says, "the former part of this clause is declaratory of the old prerogative law, the latter is a new restriction of it, so that it shall not take place after judgment given for the subject." With respect to the case, *Lechmere v. Thorowgood*, upon which so much has been said, he said, "in *Lechmere v. Thorowgood*, it appears by Comberbach, 123, and 3 Mod. 236, that first HERBERT, and then HOLT, were clearly of opinion, that after execution begun, but not com-

pleted (and of course after judgment signed), the King's extent came too late." This case is a little obscure from its being reported only piecemeal, and in different books, but with some attention it will be found to be clear and consistent; by reading the several parts of it in order of time as they occur, viz., the pleadings, 2 James 2, 2 Ventris, 156; first argument, 4 James 2, 3 Mod. 236; second argument and judgment, 1 William and Mary, Comberbach, 123, 1 Shower, 12; and a subsequent action between the same parties in effect in the Common Pleas, viz., *Lechmere v. Toplady*, 2 Vent. 169. In *The Attorney-General v. Andrew*, Hardr. 23, it was held by the Court of Exchequer, that when there was a judgment and execution by *elegit*, a debt of the King prior to the judgment; but the process thereon sued out after, it should be postponed to the judgment. And from these authorities Lord Chief Baron COMYNS, in his Digests, collects this doctrine, that if execution be upon a judgment against the debtor, and before *venditioni exponas*, an extent comes at the King's suit (which is the very case at bar), those goods cannot be taken on the extent; and this opinion is also supported by *The King v. Dickinson*, Parker, 262. The case of *The King v. Dickinson* was this: A. was indebted by judgment to B., by bond to C. and D., and by simple * contract to E., and died. * 162 E. being a debtor to the King caused the debt due to him to be seized into the King's hands, and upon this a *scire facias* issued against Dickinson, executor of A.; and before the return of it, C. and D., the bond creditors, obtained judgment; and then Dickinson pleaded to the *sci. fa.* the prior and the subsequent judgment. The Attorney-General demurred. The points argued in Hilary term, 1691, were first, whether the subsequent judgment should be preferred to the King's debt, for it was admitted that the preceding judgment should be preferred. The second is unnecessary to state. This case was adjourned to this term (Easter, 4 Wm. & Mary, 1692), when it was adjudged for the King, that his debt should be preferred before the subsequent judgment, namely, before any bond, Hardres, 23; but a precedent judgment should be preferred before it, upon the words of the 26 § 33 Hen. 8, c. 39: "So always that the King's suit be taken and

commenced, or process awarded for the debt of the King, before judgment given for the other persons." In *Rorke v. Dayrell*, 4 T. R. 402, the plaintiff sued out a *fi. fa.* returnable on 12th January, 1788. The writ was delivered on the 7th January to the sheriff, who on the 8th seized the goods. Before the sale, namely, on the 11th, a writ of extent issued tested on that day, and on the 12th it was delivered to the sheriff, who acted under the extent, and returned *nulla bona* to the *fi. fa.* The case was argued on the Statute of the 33 Hen. 8, c. 39, § 74. The Court were unanimously of opinion that the extent came too late. Lord KENYON states: "Where the King and a subject stand in equal degree, there is no doubt but that the King's prerogative must prevail, and therefore, where the property of the goods remains in the

* 163 * King's debtor at the time, and an execution at the suit of the King and another at the instance of the subject are sued out, the former will be preferred. On this principle the case of *The King v. Cotton*, Parker, 112, proceeded: that was not the case of an execution, but a distress; the goods taken were *in custodia legis*, as a pledge to answer the demand of the landlord, and the property in the goods was not divested out of the tenant. Now, in this case, the sheriff had actually seized the goods under the plaintiff's writ of execution; and an execution once begun shall proceed; it shall not stop on the issuing a commission of bankrupt against the debtor; and in this respect, I know no distinction between the case of the Crown and that of a subject. As to the Stat. 33 Hen. 8, c. 39, § 74, either it did or it did not give some new privilege to the Crown. If the counsel for the Crown contend that it did, they must take the word *execution* as referring to personal chattels, and then the words are against the King, because here there was a judgment by the plaintiff. If it did not introduce some new benefit, then the Crown must be referred to its ancient prerogative, which only extends to the case I stated at first, namely, when the King and a subject stand in equal degree, and the property is not altered, then the former shall prevail. With respect to what is supposed to have been said by Lord MANSFIELD, in *Cooper v. Chitty*, of Comberbach having mistaken Lord HOLT's opinion in *Lech-*

mere v. Thoroughgood, it is as probable that the report of that observation is misstated." Justice ASHHURST says: "The case of *Uppom v. Sumner* certainly underwent a great deal of consideration before it was decided; all the prior authorities were thoroughly examined at that time. * Unless, * 164 therefore, it could be shown that the case proceeded upon wrong principles, it ought to govern the present. The words of the Stat. Hen. 8 are clear and decisive, that the King's suit shall be preferred to that of any other person. So always that the King's suit be taken or commenced, or process awarded before judgment be given for the said other persons. Now this Act of Parliament gave a new prerogative to the King in various instances which he had not had before; by that he is enabled to issue immediate execution in cases which he could not before, for before he had only a right to such execution when the debt was upon record. And as this was a new prerogative, the legislature had a right to restrain him; and they have in express terms restrained him where the subject's judgment is prior to the inception of the King's execution." Mr. Justice BULLER says: "This case arises on the Stat. 33 Hen. 8, for previous to that Act the Crown could not issue immediate execution on a bond debt. Though the cases that have already happened on this statute show that the Act is not to be confined to bond debts only, but that it extends to all debts and executions. It is so stated, in express terms, by Lord COKE, in *Sir T. Cecil's Case*, 7 Rep. 18 b. If this Act of Parliament be restrictive on the Crown, it goes a great way to determine this question, for if it be, it expressly requires that the King's suit shall be commenced before judgment is given for the subject. Now that was expressly decided in the case in *Hardres*, where the whole Court were of opinion that the statute does abridge the King's prerogative. And there Chief Baron STEEL said, 'the subject's title is prior to the King's, and is executed.' On this ground, I put the question to the * counsel in argument, 'What effect a judgment * 165 obtained by a subject would have, where he lay by till the King's extent was executed.' I am inclined to think, that in such a case the execution by a subject would be postponed; but it is not necessary to decide that point in the

present case. As to the effect of the Statute 33 Hen. 8, c. 39, it is impossible to have a more direct authority for the restriction on the King's prerogative than in 7 Rep. 19 *b*, where it is said, 'The Act hath given a benefit and advantage to the King; first, in making every bond made to the King in nature of a statute staple; secondly, in giving remedy to the King himself for obligations made to others to his use; thirdly, to recover costs and damages; fourthly, in suing of execution for all his debts; fifthly, in charging the issue in tail, and the heir who hath the land of the gift of his ancestor;' and, therefore, it was the intent of the Act, to gratify the subject, that where a new provision was made for the levying of the King's debts in a more speedy and beneficial manner than the King had before, the subject also should have some new benefit which he had not before. Now that new benefit was, to give him a preference in cases where his judgment was obtained before the extent of the King issued."

Mr. Justice GROSE says: "The simple question is this, whether the King's right of issuing an extent upon a bond supersedes a prior judgment of a subject. If the Crown have such a right, it must arise upon the Statute of 33 Hen. 8, c. 39, § 74; Gilb. Hist. Exch. 165. Now the words of this clause in the Act are extremely pointed to show, first, what the King's prerogative was before; secondly, how far the prerogative was intended to be assisted in these cases, and how far * 166 to be limited. But it is said, * that 'execution' in this

Act was intended only to affect lands. But there is no reason why it should be so confined; it must mean every kind of execution to which the King was entitled before the passing of this Act, otherwise the King would be bound in cases where he had a prerogative before. Thus, this case stands on the words of this statute. The authorities also are decisive; first, the case in *Hardres* is very pointed; and there it was not even hinted that execution in this Act ought to be confined to an execution against land. Then came the case of *The King v. Dickinson*, and Lord Chief Baron COMYNS (2 Com. Dig. 538, 648; G. 8) drew this conclusion from the cases, that, if execution be upon a judgment against the King's debtor, and before a *venditioni exponas* an extent

comes at the King's suit, those goods cannot be taken on the extent. Therefore as well on the decisions as on the construction of the Statute 33 Hen. 8, the plaintiff is entitled to recover." After the decision of these two cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, come the case of *The King v. Wells & Allnutt*, in the Court of Exchequer, which, as to the point upon which the Court delivers their judgment — for there was another upon which the case might have been put — was precisely similar to the present. The Court of Exchequer gave judgment for the Crown; and such has been the practice of that Court ever since. That case, however, was principally founded upon the case of *The King v. Cotton*. The principle on which that case was decided, being stated in the judgment of the Lord Chief Baron in *The King v. Wells & Allnutt*, to be, that if the King's execution bore *teste* before the property was altered, it bound that property. The case, however, of *The King v. Cotton* arose upon a distress, and not upon an execution, which I apprehend, and it is so stated by Lord *KENYON in his judgment of * 167 *Rorke v. Dayrell*, makes a material difference; the sheriff, in the case of seizure under an execution, having in my judgment at least a special property in the goods. In the case of *The King v. Wells & Allnutt*, the Lord Chief Baron relied much on *Stringefellow's Case*, the difference between which and the present case I have already pointed out, viz., that in that case the *liberate* is the execution, and was not issued until after the issuing of the Crown process. The question was afterwards brought before the King's Bench, in *Thurston v. Mills* (16 East, 254), and twice argued, and the Court were prepared to give their judgment; but on the day on which it was to have been given, they suggested a doubt as to the form of the action, and directed a third argument upon that point only, upon which they gave their judgment against the plaintiff. What the judgment was which the Court were prepared to give upon the general question, it is impossible to say. It is not probable that it was in favour of the defendant, or at least unanimously so, for if so, they would probably have put the question at rest for ever. It is not likely the Court would have raised another question, and

have given their judgment upon the question so newly raised. With respect to the observation which has been made, that if the statute were to be construed literally, the Crown would be in a worse situation than the subject, if the King's suit must be commenced before judgment given for the subject; for then, if the subject's judgments be first, he would have preference, though his execution were last, which is not the case even between subject and subject. I apprehend the true answer to that observation is, what was suggested by Mr.

Justice BULLER, in his judgment on *Rorke v. Dayrell*.

* 168 He thought it unnecessary to decide on that * particular case, viz.; that in case of a laches or delay on the part of the subject, his execution would be postponed. I believe, by looking to the writ of extent itself, it will appear by the terms of it that it is issued by virtue of this statute. Without trespassing further, therefore, upon your Lordships' time, my humble answer to your Lordships' questions are, first, that this writ of extent shall not be executed by the sheriff by extending the same goods, seizing them into the King's hands, and selling them to satisfy the Crown debt, without regard to the writ of *feri facias*, under which he had at first seized them; and secondly, that all other things remaining the same, it makes no difference whether the extent was in chief or in aid.

MR. JUSTICE LITLEDALE. — The question is, whether, under the particular circumstances of this case, the execution of the Crown or that of the subject is to prevail. Connected with these questions, the case of *Uppom v. Sumner* (2 Black. 1251, 1294) came before the Court of Common Pleas in 1779, and was decided against the Crown; *Rorke v. Dayrell* (4 T. R. 402) afterwards came before the Court of King's Bench, and was also decided against the Crown. Then, *The King v. Wells & Allnutt* (16 East, 278, n.) came before the Court of Exchequer, and was decided in favour of the Crown. After that, *Thurston v. Mills* (16 East, 254) came before the Court of King's Bench, in order to have the question settled; but after hearing the case argued twice upon the principal point, it went off on a point of form, that an action for money

had and received would not lie, and therefore the question remained as it was. As no judgment was delivered, it is immaterial to conjecture what the opinion of the Judges was. After these, *The King v. Sloper & Allen* (6 Price, * 114) came before the Court of Exchequer, and the * 169 Court there acted upon the case of *The King v. Wells & Allnutt*, in favour of the Crown. In this case an information in the nature of an action for a false return was filed, and after judgment for the Crown in the Court of Exchequer, the Court of Error, when it had been twice argued, determined that an information for a false return would not lie, as the return was true in fact though false in law. In giving my opinion, I shall not consider whether the Judges on these occasions were more or less competent to decide them, from having filled one situation or another, or whether any of them laid too much or too little stress upon former authorities; such a discussion would protract the case into a very great length, without any beneficial result. The present case is brought forward to settle the law where there have been contrary decisions; and I shall consider the case as it would have stood if none of these later cases had occurred. In ascertaining what is the King's prerogative, two questions arise; first, as to its extent independently of the Statute 33 Hen. 8, c. 39; and secondly, upon the effect of that statute. The Crown, by its prerogative, has some privileges and advantages by the common law beyond what a subject has, and a reason for this is given in Gilbert's History of the Exchequer, p. 90: "because the public ought to be preferred to private property, and the rather because the King is supposed by public business not to be able to take care of every private affair relating to his revenue; and therefore, no time occurs to the King, and if he was to be prevented of his execution by another person coming in before him, laches must be imputed to him, which the law does not allow." And in Co. Litt. 131 b., Lord COKE gives, as a reason, that "thesaurus regis * est fundamentum belli et firma- * 170 mentum pacis." And there is no doubt, that where the King and subject stand in an equal degree, the King's prerogative must prevail. One of the advantages which the

King had was, by giving protection to his debtor, that he might not be sued or attached till he paid the King's debt. But inconvenience being felt from it, it was enacted by 25 Ed. 3, c. 19, "That notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's Court by their debtors, and if judgment be thereupon given for the plaintiff as demandant, the execution of the same judgment shall be put in suspense till *gree* be made to the King for his debt; and if the creditors will undertake for the King's debt, they shall be thereunto received and shall have execution against the debtors of the debt due adjudged to them, and also shall recover against them as much as they shall pay to the King for them." No question can arise upon this Act of Parliament, because it only applies to those cases where protection had been granted to the King's debtors, which has not been done here; and indeed, it appears from Co. Litt. 131 *b*, that these protections are now entirely fallen out of use.

On the part of the Crown it is contended, that the King, by his prerogative, has a right to be first served and paid by his debtors, provided his process issues at any time before there is a complete divesting of the property out of the debtor. And that, although upon the seizure by the sheriff under an execution, there is a special property vested in him, yet that the general property remains in the debtor till there is an absolute alteration, which can only be by sale. This extent of prerogative is denied by the judgment creditor, and

he says, that upon the seizure by the sheriff, the property * 171 erty * is divested out of the debtor; and whether it be so or not, yet that the execution is executed by the seizure, and that the Crown process comes too late.

The first case in the order of time relied on by the Crown, is that of *Stringefellow v. Brownesoppe* (Dyer, 67 *b*), which, as it has been already stated, it is not necessary for me to go through again. The same case is also to be found in Roll. Abr. 528, tit. Prerogative de Roy. Some doubt seems to have been expressed at the time as to the propriety of the decision, but assuming it to be right, I do not think it trenches on the grounds on which I form my opinion, because that was

an *extendi facias* on a statute staple, under which the goods are by a writ directed to be seized into the hands of the Crown; and after that is done and so returned by the sheriff, another writ called a *liberate* issues, demanding the sheriff to deliver them to the creditor to hold until he shall be satisfied his demand. The property therefore does not pass out of the debtor till the *liberate*, and the execution cannot be considered as executed till the *liberate* is executed. And in *Blayne's* (Cro. Eliz. 47) *Case*, where a question arose, whether a lessee was liable for rent incurred before the time of a writ of *extendi facias* and a *liberate*, it was held, that before a *liberate* awarded, *nihil operatur*, and the writ of *extendi facias* is but of form when it speaks of seizing into the Queen's hands, for it never was seen that lands were seized upon that writ. *The King v. Andrew* (Hardr. 23) is relied upon on the part of the Crown, for what Chief Baron STEEL gives as the reason of his judgment against the Crown, that the title of the subject was prior to that of the King, and was executed. Whatever effect that opinion of Chief Baron STEEL may have upon the Statute 33 Hen. 8, it can have none to support the *doctrine * 172 of prerogative contended for on the part of the Crown, because as the title of the subject was complete on the delivery of the land on the *eligit*, the question of prerogative could not arise. The case of *Smallcombe v. Cross & Buckingham* (1 Ld. Raym. 275; 1 Salk. 320; 5 Mod. 376, and in other books) has also been mentioned. That arose on two writs of *feri facias*, at the suit of different creditors, delivered to the sheriff on the same day, and he executed the last the first, and therefore proves nothing as to the point of prerogative. And as to any question arising, whether the execution was executed, it is to be observed, that there was no seizure under the first writ. In the report of 5 Mod., Shower says, in argument as to the prerogative, "that if the King's writ of extent came out after execution, yet the execution is superseded, and the King's extent shall take up the goods; but if the sheriff had sold the goods by bill of sale, &c., the property is altered and shall not be divested by the King's writ." This does not reach the point under consideration, for he does not state at what stage of the execution the King's extent is

supposed to come in, and if it did bear upon the point, it is only the statement of counsel. In *Sir Edward Cook's Case* (2 Roll's Rep. 294). Mr. Justice DODDRIDGE says, in page 296, "If a writ comes for the King before the execution is finished, the King shall be preferred, as is to be seen in the case of *Brownesoppe*, in 4 & 5 M." But the question is, when in point of law the execution is finished, and as he takes his authority from *Brownesoppe's Case*, his opinion carries it no further than that case; Chief Justice HOBART, in p. 299 of the same case, says, "it is certain that where a man is debtor to the King, the King shall never lose his * 173 debt but where there is nothing to satisfy * him." This expression of HOBART does not, however, advance the point contended for by the Crown, for nobody could have any doubt about that. *The Attorney-General v. Capell* (2 Show. 480) was a question between the Crown and the assignees of a bankrupt, and in the conclusion of the case it is said, "Extents have been held good that have been made upon goods actually levied by virtue of a *feri facias* and in the sheriff's custody, the extent coming before bill of sale made, so as the property was not altered." As far as that statement goes, it is in point for the Crown, but it does not appear how that statement came to be introduced. Sir BARTHOLOMEW SHOWER argued the case as counsel for the assignees, and after his argument, he says, that it was answered, &c., &c., by which I understand that it was answered by the counsel for the Crown. Then a case in the Exchequer is cited, and then at the end of the case the statement above mentioned is added; and which, therefore, I presume, was added by the counsel for the Crown by way of illustration; and if so, it is only the statement of counsel. *The King v. Cotton* (Parker, 112) is also relied upon, as in favour of the Crown; but that was a case of a distress for rent, which had been seized and appraised before the extent came in, but there is a great difference between a distress and an execution. Chief Baron PARKER, in p. 121, says, that "a distrainer neither gains a general nor a special property, nor even possession in the cattle or the things distrained. He cannot maintain trover or trespass, for they are in the custody of the law by the act of

the distrainor, and not by the act of the party distrained upon." In p. 125, he says, "Though a sheriff may maintain trespass or trover for goods taken in execution by him against a wrong-doer, because he is answerable over for the * value, yet goods so taken in execution remaining * 174 unsold are liable to seizure upon an extent." This opinion of Chief Baron PARKER is in point for the Crown, and though it was not upon the question in the case, yet it is illustrative of it, and is certainly entitled to great attention. *The King v. Peck* (Bunbury, 8) is in point for the Crown, if it can be relied upon. That was a question, whether the sheriff should amend his return, and upon an order being made it appears to have been what the sheriff wanted. At the end of the case there is an N. B., "it was taken for granted, that though the goods were levied by virtue of the *feri facias* three days before the *teste* of the writ of extent, yet that was no bar to the Crown, but, *quare*, if they had been sold, for then execution had been executed." If the last reason be the only one that can be adduced, I think it cannot be supported, as I think the execution is executed by the seizure under the *feri facias*. What is said in Chief Baron GILBERT'S History of the Exchequer, p. 89, may also be cited for the Crown. He says, "but goods were bound at common law from the *teste* of the writ, whether it was a *levari* or a *feri facias*, because otherwise the debtors by alienation of the chattels might disappoint the executions of their lords, who having by their process a right to distrain goods, there arose a lien on those goods from the time the *levari* was taken out, and the King's prerogative could not be less than the right of the subject, and therefore bound the goods from the *teste* of the writ; but this was found inconvenient, and therefore by 29 Car. 2, c. 3, no execution shall bind the property of goods but from the time of the delivery of the writ to the sheriffs; but this Act seems not to extend to the King, for an extent of a later *teste* supersedes an execution * of the goods * 175 by a former writ, because, by the King's prerogative at common law, if there had been an execution at the subject's suit and afterwards an extent, the execution was superseded till the extent was executed, because the public ought to be

preferred to private property, and the rather because the King is supposed by public business not to be able to take care of every private affair relating to his revenue, and therefore no time occurs to the King; and if he was to be prevented from his execution by another person coming in before him, laches must be imputed to him, which the law does not allow, and since the King is preferred in the execution, therefore an executor is obliged by the law to pay the King's debt on record, before a debt on record to a subject. Where the Chief Baron is, as above, speaking of the King's prerogative as to priority of execution, it does not appear what particular circumstances of the subject's execution he alludes to. He afterwards goes on to point out instances where the King's extent shall be preferred though the subject's execution is running at the same time; but they appear to apply to cases of the subject's execution on a statute staple, as to which no doubt can be entertained but that it is not complete till the *liberate*. The expression of Lord MANSFIELD, that no inception of an execution shall bar the Crown, is also relied upon for the Crown; but the question is, what is an inception of an execution, and whether this execution has not gone beyond an inception, and whether the execution is not executed.

These appear to be the principal authorities for the Crown as to the general extent of the prerogative, independent of the Statute Hen. 8. There can be no doubt but the property is partially divested out of the debtor, and up to the * 176 extent of enabling the sheriff to * carry the writ into effect he has a special property in the goods; and so far the property is changed, and the sheriff may maintain either trespass or trover against persons who take the goods from him without lawful excuse, as appears by the cases *Tyrrel v. Bash* (Cro. Eliz. 639), *Wilbraham v. Snow* (2 Saund. 47), and is taken for granted in *Clerk v. Withers*, to which I shall presently refer, and in *The King v. Cotton*, already cited. The property is not vested in the creditor, though the contrary is laid down in some cases, because the sheriff is not to deliver the goods to the plaintiff; he is to make of the goods the sum recovered by the judgment, and which sum is

to be paid to the plaintiff, who, by the mere seizure, has nothing to do with the goods; and, in that respect a *fiery facias* differs from an *elegit*, where the sheriff is to deliver goods, as well as lands, to the plaintiff at a reasonable price. But I think that the property is not wholly divested out of the defendant by the act of seizure, because if a second execution come in before sale under the first, the sheriff may seize under that, which he could not do if the property were wholly out of the debtor; and so, if upon a writ of *fiery facias* the sheriff has sold as much as will satisfy the first writ, and he continues to go on and sell other goods, the debtor may have an action of trover against the sheriff for such sale, as appears by the case of *Stead v. Gascoigne* (8 Taunt. 527). And so also the debtor may, I apprehend, maintain trover against the sheriff in case of his selling after the debtor has tendered him the amount of the money to be levied under the writ, *vide, The King v. Bird* (2 Show. 87). The Crown contends that as it is only a special property which is divested out of the debtor, and the general property remains in him, the execution of the Crown is to *attach upon the * 177 whole property, as much as if there had been no special property divested. But I do not assent to that, and I think that the execution of the Crown cannot have any greater effect upon the property which remains in the debtor than the execution of a private individual upon it.

It will be proper to see what is the effect of the seizure; whether it constitutes a change of property or not in case of other conflicting creditors; whether under executions, or commission of bankrupts, or otherwise; and I think that, generally speaking, as between subject and subject, the execution is executed by the mere act of seizure, and as the execution is begun the sale cannot be stopped by any subsequent proceedings. It is so in case of a writ of error, which operates as a supersedeas from the time of the allowance of the writ of error. If it be allowed before the goods are seized, it operates as a supersedeas. This point was completely settled in the case of *Menton v. Stevens* (Willes, 271); and Chief Justice WILLES enumerated several cases on the subject, which I shall here state from his judgment in the case of *Charter v. Peeter*,

40 Eliz. Cro. Eliz. 597, in the King's Bench; it was this: a *feri facias* was awarded, by virtue whereof the sheriff took the defendant's goods, and before sale the record was removed into the Exchequer Chamber by writ of error, and a supersedeas awarded. The sheriff returned a seizure of the goods, and that they remained in his hands, *pro defectu emptorum*; a restriction was prayed, but denied, and it was holden, *per totam curiam*, that as the sheriff had begun the execution regularly, he must complete it as far as he had gone, and a *venditioni exponas* was awarded to perfect it. It is there said

it was so held in the case of *Sir Miles Corbet v. Rook-*
 * 178 *wood*, 39 Eliz., though the record was removed by * a writ of error; and in *Dyer*, 98 *a*, 99 *b*, there is a case exactly to the same purpose. In *Moore*, 542, Hilary, 40 Eliz., if the sheriff take goods in execution under a *fi. fa.*, and has them in his hands not sold, and then a supersedeas comes to the sheriff, yet he shall not deliver the goods, but shall proceed to the sale of them, because the beginning of the execution was before the supersedeas delivered, and the execution being entire shall not be divided. In *Pocock v. Honeymen* (Yelv. 6), a writ of error and supersedeas to the sheriff after a *fi. fa.*, he shall proceed to the sale of the goods which he has levied before the supersedeas, but shall levy no more, *per totam curiam*. In the case of *Baker v. Bulstrode* (1 Vent. 255), it was held, that if, before the writ of error, the sheriff returns *feri feci et non inveni emptores*, the execution is not to be undone. And in the case of *Clerk v. Withers* (1 Salk. 322, 323), it is said that the execution is one entire thing, and is not to be superseded after it is begun. The only case to the contrary is in 2 Roll. Abr. 491, where it was said, that if the supersedeas comes before the sale, the goods shall not be sold, because (as it is said there) the property is not altered by the seizure; which reason not being a true one, Chief Justice WILLES says, I give no credit to this case. Now, from the determination above cited, it appears that the execution is considered as executed by the seizure under the *feri facias*; and though the writ of supersedeas forbids the sheriff from executing any process of execution, he may, nevertheless, proceed to sell goods already seized.

I shall now state other cases in which it appears to be considered that the execution is complete by the seizure under the *feri facias*. *Lechmere v. Thorowgood and another*, sheriffs of London (3 Mod. 236), was an action of trespass by the assignees of a bankrupt, * for taking their goods. * 179 On a special verdict, it was stated that one Toplady, on the 28th of April, became bankrupt, against whom a judgment was formerly obtained. The judgment creditor sued out a *fi. fa.*, and the sheriffs, on the 29th of April, seized the goods of Toplady. After the seizure, and before any *venditioni exponas*, that is, on the 4th of May, an extent issued against two persons who were indebted to the King, and by inquisition Toplady was found indebted to them, whereupon parcel of goods were seized by the sheriffs upon the extent, and sold; but before the sale, or any execution of the Exchequer process, a commission of bankrupt issued against Toplady, and the commissioners, on the 2d of June, assigned the goods to the plaintiff. The question was, whether the extent did not come too late, and it was held it did; or whether the *fi. fa.* was well executed, so that the assignees of the bankrupt's estate could have a title to those goods which were taken before in execution, and so *in custodia legis*, and it was held they had no title. The same case is reported in 1 Shower, 12; and it is said in a note in Shower, that it was decided entirely with reference to the liability of the officers. It is also reported in Comberbach, 123; and Lord Holt there says, "that the property of the goods is vested by the delivery of the *feri facias*, and the extent afterwards for the King comes too late, and that on the Statute of Frauds and Perjuries." The reason given is not a correct one. It is most likely a mistake of the reporter; and taking into consideration the whole of the various reports of this case of *Lechmere v. Thorowgood*, I do not consider it as having decided this precise point, but only as showing a general opinion of the Judges of that day, that the extent of the Crown should not be preferred to that of the subject in a case * like the present. *Clerk v. Withers*, though it does * 180 not relate to an extent, yet it shows in what light the seizure under a *fi. fa.* is considered, and that the execution is

thereby in effect considered to be executed. It is reported also in 6 Mod. 290, 2 Lord Raym. 1072, 1 Salk. 322. That was a writ of error on a judgment in the Court of Common Pleas upon a *scire facias*, by Clerk against the defendant, sheriff of Middlesex. The case appeared to be, that one Dives, as administrator of J. S., had recovered a judgment for 304*l.* against Clerk, and sued out a *fi. fa.* directed to the defendant, sheriff of Middlesex; and upon that writ the defendant returned that he had seized goods to the value of the debt, and that they remained in his hands for want of buyers. Afterwards, and before the goods were sold, Dives died, and Clerk sued out this *scire facias* to the defendant to show cause why the goods should not be restored to him, supposing, that now that Dives was dead, there was nobody could have the fruits of execution; and upon demurrer to this writ judgment was given for the defendant in the Common Pleas. The point determined is, that the death of a party, who has sued out a *feri facias* after the seizure of goods, but before the sale of them, will not abate the execution, or entitle the party against whom the execution was sued out to a restitution. In Lord Raymond, Lord Holt says, "after seizure of the goods there is nothing to be done by the sheriff but to bring the money into Court;" and Mr. Justice Gould says, "the substantial part of the execution is executed in the lifetime of the executor, and there is nothing wanted to complete it but the formal part. For as soon as the sheriff seizes the goods by virtue of the writ of *feri facias*, he gains a special property in them, and may maintain trespass * 181 against the * defendant if he takes them away." So it is said in Cro. Eliz. 635, he may maintain trover against a stranger that takes them away. *Wilbraham v. Snow* (2 Saund. 47, 1 Lev. 282), Mr. Justice POWELL says, "an execution is an entire thing, and that sheriff that takes the goods in execution shall go on and sell, though he is out of his office, and not the now sheriff." And in the report 6 Mod., Mr. Justice POWIS says, that the selling is but the formal part of the execution. In the judgment of the Court in Salkeld, it is said, "an execution is an entire thing, and cannot be superseded after it has begun." I shall now state in what cases the

execution has been considered as executed, arising upon questions of the construction and operation of the bankrupt laws. By 21 Jac. 1, c. 19, §. 9, it is enacted, "That all and every creditor and creditors having security for their several debts by judgment, statute, recognizance, specialty, or other security, or having made attachments of the goods and chattels of the bankrupt, whereof there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels, and other estate of the bankrupt, before such time as he shall become bankrupt, shall not be relieved on any such judgment, statute, &c., for any more than a ratable part of their just and due debt with the other creditors of the bankrupt, without respect to any such penalty or greater sum contained in such judgment, statute, &c., or other security." Upon this statute it has been determined, that where a creditor has obtained a judgment, and sued out a *fiery facias*, and a seizure has been made under it, if before sale an act of bankruptcy intervenes, the judgment creditor shall not be obliged to come in under the commission, but the sheriff may proceed to * sell the goods. The words of * 182 the Act being, "whereof there is no execution or extent served or executed," it might be contended that the execution under which the sheriff has seized, but not sold, is not an execution executed, because there has been no sale; but the determinations upon the statute of James show, that as soon as goods have been seized under the *fiery facias*, that is considered in law as being an execution executed, and the sale is but a formal part of the execution of the process, and has therefore no further effect on the goods in respect of the alteration of the property in them. It cannot be necessary to quote any authority for this position, because the constant practice at Nisi Prius in disputes between the assignees of a bankrupt and the judgment creditor, is to enquire whether the act of bankruptcy, or the seizure of goods under a *fi. fa.*, was first, and to consider the execution executed by the seizure under the *fiery facias*. I think, therefore, it appears quite clear, that on all cases between subject and subject, the execution is considered as executed by the mere seizure of the goods under the *fiery facias*. Then the material question is,

whether under the process of the Crown the same rule is to hold as between subject and subject. There is no doubt but the interest of the Crown is to be preferred, all things being alike in the two cases. The Crown has a preference by having the goods bound from the *teste* of the extent, which is an advantage that the subject has not; and if the extent be tested before the seizure under the *fieri facias*, the extent will prevail; but there seems no reason, upon principle, why, if a rule be perfectly well established as between subject and subject, that the execution is executed by the seizure under *f. fa.*, the same principle should not be applied in all cases, even where the Crown is concerned. There

* 183 * is no doubt a sort of property remaining in the debtor, upon which, as a second execution may attach, the extent may attach also; but it does not therefore follow that it is not only to attach, but also to do away with the execution in the sheriff's hands. And it should seem that the extent ought only to affect that portion of the property which remains in the debtor, in the same way as the second execution of a private creditor does. In the case of a pledge of goods by the owner, the Crown's extent can only take the goods subject to the pledge, as is admitted by Chief Baron PARKER, in *The King v. Cotton*, p. 118. So also, in *The King v. Lee* (6 Price, 269), it was held, that if a factor has a lien upon goods in respect of acceptances, it was held that the Crown could only take the goods subject to the claim of the factor. So also, according to the case of *Casberd & another v. Ward & others* (6 Price, 4, n.), a deposit of title-deeds by a simple contract debtor of the Crown is an equitable mortgage, and binds the Crown. So a wharfinger has a lien against the Crown for his general balance. And if, by the charge upon the property by the contract of the party, the Crown only takes it subject to the charge, the same reason ought to apply where a creditor has obtained a claim upon the property by the process of the law. I shall now consider what effect the 33 Hen. 8, c. 39, has upon the case. By the 50th section of the Act, bonds to the King are put on the same footing as statutes staple; and in the 52d and following sections, up to and including the 57th, provisions are made

for the course of proceeding for the King's debts; a further provision is made in the 73d section; and then comes the 74th, upon which the question arises, "That if any suit be commenced or taken, or any process hereafter awarded, for the King, for the recovery of any * of the King's * 184 debts, then the same suit or process shall be preferred before the suit of any person or persons; and our said Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debt, before any other person or persons, so always that the King's said suit be taken or commenced, or process awarded, for the said debt, at the suit of our said Sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons." And, in my opinion, as there was no award or process for the King's debt till after judgment was obtained for the private creditor, and till after the goods were seized under a *fiери facias*, the execution at the suit of those creditors must prevail over the extent. In construing Acts of Parliament, it is a safe rule to follow the very words of the Act, unless so strict an interpretation be irreconcilable with other clauses, or be contrary to the general intent of the Act, or be inconsistent with some established principle of law, which it may be supposed it was not intended to interfere with. But general objections are made to this right of the creditors falling within this Act of Parliament; it is said, first, that this proceeding by extent is not a taking or commencing a suit, or awarding process. It is certainly not taking or commencing a suit, but I think it is awarding process. An extent is a writ, and is constantly so called. It commands the sheriff to take the body of the debtor, and so far that part of the execution is complete. It is true that, as to goods, it is not complete till a *venditioni exponas* issues, as it is part of the command of the writ that the goods are not to be sold till a writ of *venditioni* issues; and so, in the case of a subject, the execution on a statute staple is not complete till a * *liberate* issues; but then, when the * 185 writ of *liberate* is sued out, it has relation to the writ of extent, and they become but one extent, as is said by the Court in *Audley v. Halsey* (Cro. Car. 148.) But I cannot

doubt that a writ of extent is process, not only immediate extents in chief, but also extents in aid; and as soon as a debt from a third person to the King's debtor is found by inquisition, and recorded, it falls within the 55th and 56th sections of 33 Hen. 8, and an *extendi facias*, as there mentioned, may be awarded. The common course of proceeding upon a record debt to the Crown, whether it be originally of record, or whether it be not originally of record, but recorded by inquisition under a commission, is by *scire facias*, where the debt is not in danger of being lost, and in that case the *extendi facias* is the ultimate process of execution; but if the debt be in danger of being lost, then an extent may issue in the first instance. But no extent in the first instance, either against the immediate debtor to the Crown, or against persons indebted to the Crown debtor, ever issues, unless there be an affidavit that the debt is in danger. In *The King v. Pearson* (6 Price, 292), Chief Baron THOMSON says, "In the case of an extent, an affidavit of the insolvency of the debtor is made, but if that cannot be done, the *scire facias* is the only course." The Crown has not an election except in cases of insolvency. And the rule in the Exchequer of the 15th Charles requires that he who desires any debt to be proved by inquisition in his aid, shall make oath, amongst other things, that the debtor is much decayed in his trade, so that, unless a speedy course be taken against him, the debt is in great danger to be lost. But it can make no difference as to the nature of the extent, whether it issue upon a judgment obtained by a *scire facias*, or whether it issue

* 186 * in the first instance. The proceeding by extent in the first instance is alluded to in the 55th section of the Statute of Henry 8, as one way of proceeding, by the various modes there mentioned, and, amongst others, by *extendi facias*, if need shall require; and in this very record the extent is said to be according to the form of the statute made for the recovery of the debts of our Lord the King, as is the common form. But I do not think it material whether the extent in aid be an execution or not, for, at all events, it is a process for the recovery of the King's debts, which is all that the statute mentions, for it is something sued out, by which, in

the usual course of the Court, the King's debt will eventually be paid. It is said the 74th section applies only to land and not to goods. I see nothing in the clause so to restrict it; the 56th section speaks of execution upon the body, lands, and goods of the party, and there seems no reason to suppose that the 74th section should be less extensive in its operation.

Assuming, then, that the 74th section applies to the case of extents in aid, and also to goods, it is to be considered whether it increases or abridges the prerogative of the Crown, and in what degree. Upon this statute it was held, in *Sir Thomas Cecil's Case* (7 Rep. 93 b), that the Act has given a benefit and advantage to the King, first, in making every bond made to the King in the nature of a statute staple; secondly, in giving remedy to the King himself for obligations made to others to his use; thirdly, to recover costs and damages; fourthly, in suing of executions for all his debts; fifthly, that the King shall be preferred in his execution before common persons; sixthly, in charging the issue in tail, and the heir who hath the land of the gift of his ancestor. And therefore it was * the intent of the Act to gratify the * 187 subject, that where a new provision was made for the levying of the King's debt in a more speedy and beneficial manner than the King had before, the subject also should have new benefit which he had not before. And it may be said here, that one of the new benefits was to give the subject a preference in cases where his judgment was obtained before the extent of the King issued. In *The King v. Andrew* (Hardr. Rep. 27), Mr. Baron PARKER says, "The King has many prerogatives *pro bono publico*; but in the case in question, the Statute 33 Hen. 8 abridges the prerogative, and controls the common law. Affirmative statutes do not alter the common law, but negative statutes do, and here is a negative implied." And Mr. Baron NICHOLLS says, "Before the Statute 33 Hen. 8, the King was not bound, but the statute has made an alteration, though it sounds in the affirmative, for it enacts a new thing, and *ita quod*, which makes a condition precedent and a limitation." Here are, therefore, opinions expressed, in different cases, as to the general effect

of the statute in abridging the King's prerogative. And *The King v. Dickinson* (Parker's Rep. 262), is a confirmation of this doctrine as to the effect of the Statute of Hen. 8. A. was indebted by judgment to B., and by bonds to C. and D., and by simple contract to E., and died; E. being a debtor to the King, caused the debt due to him to be seized into the King's hands; and upon this a *scire facias* issued against Dickinson, executor of A., and before the return of it C. and D., the bond creditors, obtained judgment; and then Dickinson pleaded to the *scire facias* the first judgment, and the subsequent judgments. The Attorney-General demurred. The

Court held that the King's debt should be preferred * 188 before the subsequent judgments and before * any bond; but a precedent judgment should be preferred before it upon the words of the Statute of Hen. 8. And Chief Baron COMYNS, in his Digest, tit. Debt (Geo. 9), says, "By the Statute 33 Hen. 8, c. 39, suit or process for the King's debt shall be preferred before other persons, so always as that the King's suit be commenced, or process awarded; before judgment for the said other persons;" and in the next *placitum* he says, "And, therefore, if execution be upon a judgment against the King's debtor, and before a *venditioni exponas* an extent comes at the King's suit, the goods cannot be taken on the extent," and he refers to 3 Mod. 236, and Hardr. 27. The former of these cases is *Lechmere v. Thorowgood*, and the latter is *The King v. Andrew*, upon which I have already remarked; and I only quote this passage from Comyns' Digest to show, in a general way, in what light he considered the Statute of 33 Hen. 8. The meaning of the 74th section seems to me to be, that if the Crown proceeds to execution it shall have the first execution; but in order to be entitled to that privilege, the suit must be commenced, or process be awarded, at the suit of the King, before the judgment obtained by the creditor, and that unless it be so the Crown shall have no such priority. By the first execution, I understand the prerogative privilege of execution, whatever that privilege may be, and of which the Crown may avail itself if there be process from the Crown before the judgment by the creditor. But if the process be not awarded before

such judgment obtained, then the Crown stands in no other light than a common creditor. The cases of *Butler v. Butler* (1 East, 338), and *The Attorney-General v. Aldersey*, there cited, may be mentioned as in favour of the Crown on the construction of the Statute of Hen. 8; *but *189 there the only question was, whether a penalty constituted a debt, which the courts held it did; but in both those cases the proceedings on the part of the Crown were commenced before the judgments were given for the subject, and therefore they could not avail themselves of the provisions of the statute.

Upon the best consideration I have been able to give to this case, I think that this writ of extent should not be executed by the sheriff, by extending and seizing the goods into the King's hands, and selling them to satisfy the King's debt; and I think it makes no difference whether the extent be in chief or in aid.

MR. BARON BAYLEY. — The question proposed for the consideration of the Judges is in substance this, whether, if the sheriff has seized the goods of a debtor under a *feri facias*, and those goods remain unsold in the sheriff's hands, they are liable to an extent of the Crown, tested after such seizure, and may be seized and sold to satisfy the Crown's debts, without regard to the writ of *feri facias*? and I am of opinion that they are so liable. The writ of extent directs the sheriff to inquire what goods and chattels the King's debtor, against whom it issued, had in his baliwick at the time it issued, and to take and seize the same into his hands, there to remain until the King's debt be satisfied. The question then is, whether, by the seizure under a *feri facias*, the goods so seized cease, as against the Crown, to any and what extent to be the goods and chattels of the debtor, or whether the Crown is not entitled to treat them as the goods and chattels of the debtor, to all intents and purposes, and to the same extent, as if there had been no seizure under the *feri facias*.

The command to the sheriff by the writ of *feri facias* * is, that of the goods and chattels of the defend- * 190
ant he cause to be made the sum for which judgment

is given. Till money is made the execution is in progress only. The seizure of goods is only in order that money may be made; the goods are still the debtor's goods. If he satisfies the execution, it is matter of right that they shall be returned to him; he has no occasion for a bill of sale from the sheriff; he is entitled to them upon the footing of his original ownership. If the act of God destroys them, he has no remedy. That the Crown is entitled to consider land and goods as continuing the land and goods of the King's debtor notwithstanding a seizure thereof into the King's hands upon an *extendi facias* out of Chancery, upon a statute staple, is clear from *Stringefellow's Case*, which has been cited; and the foundation of that right may be collected from the recital in the writ, that is, the prerogative of the Crown to be first paid and served by its debtors; and if the prerogative is to prevail against a seizure into the King's hand upon an *extendi facias*, why is it not to prevail against a seizure into the hands of the sheriff, who is the King's minister, upon a *fieri facias*? Can any satisfactory reason be given for a distinction? The foundation of the King's right, in the one case, is, that the property remains in the original owner till *liberate*; and I apprehend it remains, as against the Crown, in the other, in the original proprietor, till the things are sold. That the Crown is entitled to consider property as continuing to belong to the King's debtor, notwithstanding a commission of bankruptcy, which has been called a statutable execution, until a conveyance is made thereof under the commission, is established by *Rez v. Hanbury*, in 1668; and *Rez v. Capel*, in 1686 (2 Show. 481); and *Brassey v. Dawson* (Strange, 978), in 1733; and that it is equally entitled, notwithstanding * a seizure upon a distress for rent, is taken for granted in *Rez v. Dale* (Bunbury, 42), in the year 1719, and was solemnly adjudged in *Rez v. Cotton* (Parker, 112), in 1751. But I forbear stating these cases at length to the House, notwithstanding the strong analogy they bear to the case supposed in your Lordships' question, because they have been already stated, and because the authorities directly upon the point are so numerous and strong. The first authority I am aware of upon the point is the *dictum* of Mr. Justice

DODDRIDGE, in *Sir Edward Cooke's Case* (2 Roll. 295). He lays down this position: "If a writ come from the King before the execution of the subject be finished, the King shall be preferred, as may be seen in *Brownsoppe's Case* and in *Stringefellow's Case*; and though there be sufficient for you and for the King, you must wait till the King is satisfied; and if there be not enough for both, you must suffer not only delay but loss; for when the public and private interest are put in the balance of justice, the public shall weigh down the private, because the public is better than the private." In *The Attorney-General v. Capel*, in the Exchequer (Show. 481), Shower says, "Extents have been held good that have been made upon goods actually levied by virtue of a *feri facias*, and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." In *Smallcombe v. Buckingham* (5 Mod. 376, 377), where the question was, which of two subjects' writs of *feri facias* should have the priority? it had been said, *arguendo*, that if the King's writ came after a sale by the sheriff under a *feri facias*, the goods might be seized again for the King. Shower sets the matter right: "If the King's writ of extent comes out after execution, yet the execution is superseded, and * the King's extent shall take up the goods, but * 192 if the sheriff had sold the goods by bill of sale, the property is altered, and shall not be divested by the King's writ." In *Rex v. Peck* (Bunbury, 8), 1716, the sheriff seized upon a *feri facias* from C. B. in April, but before he sold, an extent was delivered to the sheriff, tested 2d of May. A motion was made to amend his return to the extent. Bunbury makes this note: "N. B. — It was taken for granted, that though the goods were levied by *feri facias* three days before the *teste* of the extent, yet that was no bar to the Crown, but *quære* had they been sold, for then execution had been executed." At no great distance of time, viz., 9th of June, 1722, GILBERT was made a Baron, and on the first of June, 1725, Chief Baron; and his Treatise upon the Court of Exchequer will show what was his opinion upon this point. He had just been stating that the King's prerogative could not be less than the right of the subject, and that the *levari*

or *fieri facias* of the subject bound his debtor's goods from the *teste* of the writ. This, he says, was found inconvenient, and occasioned the provision in 29 Car. 2, that no execution should bind the property in goods but from the delivery of the writ to the sheriff. "But this Act," he continues, "seems not to extend to the King, for an extent of a later *teste* supersedes an execution of the goods by a former writ, because, by the King's prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded till the extent was executed, because the public ought to be preferred to the private property, and the rather, because the King is supposed, by public business, not to be able to take care of every private

* 193 affair relating to his revenue, and therefore * no time occurs to (*i.e.* hinders or obstructs) the King; and if he was to be prevented from his execution by another person, laches must be imputed to him, which the law does not allow." Here, therefore, you have the deliberate opinion of a man of great industry and research upon a point it was peculiarly his duty to investigate, relative to what was the course of proceeding in his own Court, and likely to be of frequent occurrence; and he speaks of it without the least degree of doubt, and gives what has the appearance of a satisfactory reason for the prerogative priority. In a few lines afterwards he puts the case where the subject has a statute staple or a judgment prior to the debt of the King, and seizes the debtor's lands before any seizure by the King, and considers the question what shall be the effect of a subsequent extent by the Crown; and he lays down this distinction, that if the subject has the possession delivered to him by a *liberate* before the extent from the Crown, the subject shall hold the land discharged from the King's debt; but if the King's extent comes before the possession by *liberate*, the King's debt shall be preferred, and the subject wait till the King's debt is satisfied. In *Rex v. Cotton*, in the able and elaborate judgment Lord Chief Baron PARKER there delivers (in which he treats *Stringefell's Case* as good law, and considers, as the line of distinction in those cases, whether the property remains in or is divested out of the King's debtor), he says, upon the point now under

consideration, "goods taken in execution and remaining unsold are liable to seizure upon extent.

I now come chronologically to the cases of *Uppom v. Sumner*, in the Common Pleas, in 1779; and of *Rorke v. Dayrell*, eighteen years afterwards, 1797, in the King's Bench. They are both in point; and if they be law, * the * 194 judgment in this case ought to be against the Crown.

I am of opinion they are *not* law. When *Uppom v. Sumner* first came before the Court, the counsel for the execution creditor (*Serjeant Walker*), declared he could not support the case, and gave it up. He afterwards desired to argue it, and put it (upon what it had never before been put) the Statute of Hen. 8, and said (with what truth the authorities I have just been mentioning will show) it had always been understood that an extent was to be postponed to a judgment. *Serjeant Grose*, on the other side, does not appear to have brought under the notice of the Court any of the direct authorities I have mentioned, but contented himself with relying on *Rex v. Cotton*, and the *dictum* it contained; and upon *Rex v. Badin* (Show. P. C. 72), in which I can find nothing bearing upon the present case; the Court took time to consider, and then decided for the execution creditor, upon the construction they put upon the 33 Hen. 8, c. 39, § 74, and upon the authorities of *Lechmere v. Thorowgood*, (Comb. 123; 3 Mod. 236; 2 Vent. 169; 1 Show. 12, 146); *The Attorney-General v. Andrew* (Hardr. 23; 2 Comyns' Digest, 538); and *Rex v. Dickinson* (Parker, 262): all of which I shall consider by and by. In *Rorke v. Dayrell*, the counsel for the execution creditor again put the case upon the Statute 33 Hen. 8, c. 39, § 74, and relied upon *The Attorney-General v. Andrew*, *Lechmere v. Thorowgood*, *Uppom v. Sumner*, and the passage in Comyns' Digest. The counsel for the Crown brought forward many authorities not noticed in *Uppom v. Sumner*, viz., Gilbert's Exch. 90; Doddridge's *dictum* in *Sir Edward Cooke's* case; the *dictum* in *Petit v. Benson*, Comb. 452; the *dictum* in 2 Show. 481; and the decision in *Rex v. Peck*. It cannot be said, therefore, that the bulk of the authorities * were brought before * 195 the Court, in *Uppom v. Sumner*. Lord KENYON lays

it down, "that wherever the property in goods remains in the King's debtor at the time, and one execution comes at the suit of the King, and another at the suit of the subject, the former will prevail." But he proceeds on the ground (now generally admitted to be erroneous) that by the delivery of the writ to the sheriff the property in the goods was bound and altered, so that there remained no property in the debtor upon which the King's prerogative could attach. The other three Judges founded their judgment upon 33 Hen. 8, and *Uppom v. Sumner*, but did not notice or discuss any of the authorities cited for the Crown. After these two decisions, the point came again under consideration in *Rex v. Peckham* (or *Rex v. Wells & Allnutt*), in the Exchequer, in 1805; and after full consideration of all the authorities, the Court adopted the principle laid down in earlier cases, and overruled the cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*. This is mentioned in 2 Wms. Saund. 70, *e*; and the minutes of Lord C. B. MACDONALD's judgment are to be found in 16 East, 278. This decision was adhered to in *Rex v. Sloper & Allen* (6 Price, 114), in the Exchequer, in 1818, *dubitante* Wood, B. This being the state of the authorities upon the direct point, I shall not trespass further on the patience of the House, except to show that the cases relied upon in *Uppom v. Sumner* (with the exception of the passage in Comyns) will not support the judgment; and to state it as my opinion, that the Stat. 33 Hen. 8 applies only to cases in which the subject's execution was complete before the Crown extent is issued, not to cases where it was in progress only. In *The Attorney-General v. Andrew* (Hardr. 23) it is obvious, upon an attentive consideration of the report, that the execution

* 196 * was completed before the *teste* of the King's extent, that the land was not in the King's hands, as in *Stringefellow's Case*, but in Andrew, the execution creditor. The form of proceeding implies it. It is stated as a fact that Andrew had taken the land; STEEL, B. says distinctly, the subject's title was prior to the King's, and executed, and he and the other Judges could not have relied upon *Stringefellow's Case*, as they did, as an authority against the Crown, unless the land had been delivered over to the execution

creditor, and the execution been completed; but for that fact, *Stringefellow's Case* would have been an authority the other way. *The Attorney-General v. Andrew*, therefore, does not bear upon the question now under consideration, viz., the right of the Crown against an incomplete execution, an execution which is in progress only and not perfected. *Lechmere v. Thorowgood* (Comb. 123) was trespass by the assignees of a bankrupt against the sheriffs of London, for seizing the goods after the bankruptcy and before the commission. The sheriffs seized under a *fi. fa.* on the 29th of April, and on the 4th of May an extent issued. The question, therefore, was not between the execution creditor and the Crown, but between the assignees and both; for if either the *fi. fa.* or the extent were good against the assignees, it was an answer to the action. Whatever fell from the Court, therefore, was wholly extra-judicial, and its weight may be appreciated by what Comberbach represents to have fallen from Lord Chief Justice HOLT, "the property of the goods is vested by the delivery of the *fi. fa.*, and the extent afterwards for the King comes too late, and that on the Statute of Frauds." Now, that the Statute of Frauds does not in this respect bind the Crown is clear beyond all doubt, and a reliance upon this as one of

* the grounds of decision, in *Uppom v. Sumner*, mate- * 197
 rially diminishes the authority of that judgment. *Rex v. Dickinson* (Parker, 262) was a case not between conflicting executions, but between the claim of the Crown as assignee of a simple contract debt on the one hand, and the claim of a judgment creditor upon the other. The testator was indebted by judgment to A., and by simple contract to B., and died; B. caused the debt to him to be seized into the King's hands, and upon a *scire facias* against the executors, one question was, whether the judgment should be preferred to the simple contract debt the King had seized, and the opinion was that it should, upon the words of the Statute 33 Hen. 8, "so always that the King's suit should be taken and commenced, or process awarded, for the King's debt, before judgment given for the other persons;" but how this bears upon the question between concurrent and conflicting executions, I do

not see. Now this was an old case, in 1692; Lord Chief Baron PARKER's Reports begin in 1743. This brings me to the Statute 33 Hen. 8, c. 39, § 74. The provision in that statute is, "that if any suit be commenced or taken, or any process be hereafter awarded, for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons, and that our said Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debts before any other person or persons, so always that the said King's suit be taken and commenced, or process awarded, for the said debt, at the suit of the King, his heirs and successors, before judgment given for the said other person or persons." To form a judgment what construction is to be put upon this

* 198 * provision, it is necessary to see how the law stood when this statute passed. At the common law, the King could protect his debtor so that he could not be sued at all. By 25 Ed. 3, c. 19, a creditor might sue his debtor notwithstanding the King's protection, as far as to obtain judgment; and, if he would undertake for the King's debt, he might sue out execution, but without such undertaking the execution of the judgment was to be put in suspense till *gree* were made to the King of his debt. The provision, then, in 33 Hen. 8, c. 39, § 74, seems to me merely to narrow the prerogative, that whereas before the creditor might be restrained from suing out execution till the King's debt was agreed for, whether the King was suing for his debt or not, that from thenceforth the right of restraining the creditor from suing out execution should be confined to those cases in which the King was suing or had process awarded for his debt, but that that right should nevertheless continue if the King was suing or had process awarded. This construction appears to me to satisfy all the words of the clause, and is consistent with all the early authorities upon the point in question, and leaves untouched the common-law prerogative of the Crown over an execution whilst it is in progress.

Upon the whole, therefore, considering that the property in goods is not altered merely by a seizure under a *fiery facias* ;

considering that 33 Hen. 8, c. 39, § 74, does not apply to the case of conflicting executions between the Crown and a subject, where the Crown's extent is issued while the goods are in the hands of the sheriff under a *feri facias*, at the suit of a subject; considering, according to Lord Chief Justice TREBY's note in Dyer, 67 *b*, this very point is described as acted upon in 24 Eliz. (1582); considering * that * 199 DODDRIDGE, J. lays it down as clear law, 20 Jac. 1 (1624); and that it is noticed as such in 1686 and 1697, in *The Attorney-General v. Capell* (1 Show. 481), and *Smallcombe v. Buckingham* (5 Mod. 376); considering Bunbury's note upon the point, 1716, in *Rex v. Peck*; that Lord Chief Baron GILBERT refers to it as settled and indisputable, in his Exchequer Treatise; that Lord Chief Baron PARKER considers it as law in his elaborate judgment in *Rex v. Cotton*; and that it has since been solemnly decided in *Rex v. Peckham*, or *Rex v. Wells & Allnutt*, and acted upon in *Rex v. Sloper & Allen*; considering that 33 Hen. 8 is never mentioned as bearing upon the point until *Uppom v. Sumner*, and is shown to be inapplicable by *Rex v. Peckham*; considering the analogy furnished by *Stringefellow's Case*, by *Rex v. Dale*, and *Rex v. Cotton*, in cases of distress; and by *The Attorney-General v. Capel*, and *The Attorney-General v. Hanbury*, and *Brassey v. Dawson*, in cases of bankruptcy: I am of opinion, that if the sheriff seizes goods under a *feri facias* at the suit of a subject, and if, while the goods he seized remain in his hands, an extent issues at the suit of the Crown, those goods are liable to the Crown's extent. Upon the second question, "does it make any difference whether the writ of extent was in chief or in aid?" I am of opinion it does not. *The Attorney-General v. Capel* was an extent in aid.

LORD CHIEF JUSTICE TINDAL. — The questions proposed by your Lordships have been so often adverted to by the learned Judges who have preceded me in delivering their opinions, that it is altogether unnecessary to refer to them. I shall content myself, therefore, with saying that, upon the first question proposed by your Lordships, I agree in opinion with the *majority of the Judges, that the *200

extent in aid, tested and delivered to the sheriff after the seizure by the sheriff under the *fi. fa.*, but before the sale under such writ, is, by law, to be first executed by the sheriff, without regard to the writ of *fi. fa.*

It appears to me, my Lords, that the whole question depends upon the determination of two points, and two points only: first, whether the property of the Crown debtor is altered by the seizure of the sheriff under the *fi. fa.*; and, secondly, supposing such property to remain unaltered, whether the Statute 33 Hen. 8 applies to the present case, by restraining that which before the statute was the undisputed prerogative of the Crown, namely, the preference of the Crown where the execution of the Crown comes in competition with that of the subject; for if the property in the goods seized under the *fi. fa.* remains still in the debtor unaltered by such seizure, then the execution of the subject's writ is begun only, not completed, at the time of the issuing the Crown process; both the writs are then in conflict and competition together, and the goods of the subject are then within the exigency of the writ of extent, which calls upon the sheriff "to take and seize into the King's hands all the goods and chattels which the defendant then has (that is, at the time of the *teste* and issuing of the extent), to satisfy the King's debt," unless indeed the Statute of Henry the 8th has interposed a restriction applicable to the present case.

That the determination of these two points does in fact involve the whole of the present inquiry, appears from this, that the only two direct authorities for the preference of the subject's execution are grounded on those two points alone:

the case of *Uppom v. Sumner* resting on the application of the Statute 33 Hen. 8, *and the case of

Rorke v. Dayrell being decided by Lord KENYON, on the alteration of the property in the goods; and by the other three judges, on the authority of the above-mentioned statute. And, upon the first of these points, it appears to me, that the property in the goods seized under the *fi. fa.* is not in any manner altered by the seizure, but that it still continues in the debtor until the actual transfer thereof by the sheriff's sale under the writ to a stranger. If the property is changed

by the seizure, it must be transferred either to the judgment creditor or to the sheriff, but there are no words in the writ to give it to either. The sheriff is directed by the writ of *fi. fa.* "to cause to be made of the goods and chattels of the defendant the debt or damages recovered by the plaintiff;" in this respect the language of the *fi. fa.* differing from that of the *elegit*, by which he is directed "to deliver to the plaintiff all the chattels of the debtor, and a moiety of the land, until the debt be levied." So far, indeed, is the property in the goods from being transferred to the plaintiff in the suit, that the sheriff cannot deliver the goods to the plaintiff in satisfaction of the debt; *Thomson v. Clerk* (Cro. Eliz. 504). Again, if the defendant in the action, after seizure of his goods under the *fi. fa.*, pay the debt to the sheriff, he retains his goods, and is discharged from his execution; and any further remedy of the plaintiff is against the sheriff only; Cro. Eliz. 209. But if the property in the goods had been altered, if it had vested either in the plaintiff himself or the sheriff, or had become an actual pledge or security for the payment of the debt, it is difficult to see upon what principle the defendant should hold his goods again discharged of the debt, before actual payment thereof has been made to the plaintiff. Again, if the goods, after seizure under the * writ, but before sale, are destroyed by any un- * 202 avoidable means without the sheriff's default, the loss does not fall either upon the plaintiff or upon the sheriff, but upon the debtor, on whose goods a second levy may be made; Hob. Rep. 60: but if the property in the goods had been altered by the seizure, why is not the loss to fall upon the party whose property they have become, as undoubtedly, after the sale, the loss would be that of the purchaser? Again, if the sheriff, having received two writs of *fi. fa.*, sell under that which is last delivered to him, although he make himself liable to the plaintiff who delivered the first writ, the property of the goods is bound by the sale under the second writ, and the party cannot sell them by virtue of his execution first delivered: *Smallcombe v. Cross* (1 Ld. Raym. 252); and yet, if the property was altered by the delivery of the first writ to the sheriff, upon what principle can the sale

under the second convey the property to a stranger? The case of *Hutchinson v. Johnston* (1 T. R. 729) decides the converse of this last proposition, viz., that if the sheriff seizes under the writ last delivered to him, but before sale discovers that another writ has been delivered to him at an earlier time, and sells under the writ first delivered, and satisfies the debt of the plaintiff in the earlier writ, he is justified in so doing, though if he had sold under the second writ he could not have done so. These two authorities seem decisive that it is the sale, not the seizure, which alters the property. It has, however, been argued, that the rule of the common law, by which the property in the goods is bound by the award of the writ of execution, altered as it has since been by the Statute of Frauds, so as to become bound only by the delivery of the writ to the sheriff, implies that the property is

* 203 divested out of the debtor by such * delivery of the writ. But the meaning of those words have been explained and defined by various decisions. It will be sufficient to cite the case of *Payne v. Drewe* (4 East, 523), in which all the former cases are considered, and in which Lord ELLENBOROUGH, C. J., lays down the rule to be, that, "the goods are bound by the delivery of the writ to the sheriff as against the party himself, and all claiming by assignment from or representation through or under him." In this sense, and to this extent, therefore, may the goods of the defendant be bound by the delivery of the writ to the sheriff, without the consequence contended for, that the property of the goods is in any manner altered thereby. It has further been contended, that as the sheriff may maintain an action of trespass or trover against any wrong-doer for taking goods which he has seized, it therefore follows that he, and not the defendant, has the property in the goods so seized. But to this argument it appears sufficient to answer, that any person who has the legal possession of goods, though not the property, may maintain this action against a wrong-doer, for a mere wrong-doer cannot dispute the title of the party who is in the possession of the goods with any colour of legal title. The sheriff, no doubt, has the legal custody and possession of the goods after seizure; he has a special property in them for that

purpose, for the law has directed him to seize and make sale thereof. But this affords no argument that the absolute property in the goods is altered and divested from the defendant, for the very same action is maintainable by the finder of goods against the person who wrongfully takes them from him, or by the carrier of goods for hire, or by bailee of goods, against a trespasser ; and yet in the three cases last put, the absolute property is not divested from, but still remains * in, the true owner. But it is argued at the * 204 Bar, and that appears to be the main ground of argument, that the sheriff having such special property, the extent can only take the goods of the debtor subject to such special property, just as goods in pawn can only be taken subject to the pledge, and lands mortgaged can only be taken subject to the claims, both legal and equitable, of the mortgagee. In those cases, however, the property has actually been altered by the act of the debtor himself, under an express contract made between himself and the other party, for the benefit of such other contracting party. It is a contract complete and consummate before the seizure under the extent. It is alienation of the property, which amounts, *pro tanto*, to a sale. As, therefore, the Crown process could not seize upon property actually parted with and sold, so neither can it seize property so partially sold, except subject to the rights of the partial purchaser. But in the case under consideration, no property has been parted with by the Crown debtor under any contract previously made ; the goods are not sold ; they are only in the way to be sold. It would be a better definition of the sheriff's relation to these goods to say, he has them in his custody under a power to sell them, than any actual interest or property in them. His situation, indeed, cannot be better defined than by saying the goods are *in custodia legis*, — a phrase which plainly distinguishes a mere custody and guardianship in the goods from a change in the property. So far, therefore, as a special property in the goods is necessary for their safe custody against wrong-doers, and to render the execution of his public duty useful to the judgment creditor, so far he may be said to have the property ; but beyond this, and as against the rights of adverse claimants, there is no

* 205 authority that he has any *property at all. The only question can be, has the property passed from the debtor to any other person?

It has been further contended, that the decisions which have taken place under the Statute 21 Jac. c. 29, § 9, are an authority to show that the execution is executed upon the mere act of seizure by the sheriff, and that the subsequent sale is no more than a formal completion of the execution. By that statute it is enacted, "that the creditors who have security for their debts, whether by judgment, statute, &c., whereof there is no execution, or extent served and executed, upon the lands and tenements, goods and chattels of the bankrupt, shall come in ratably with the other creditors." And it must be admitted, that under that statute various decisions have determined, that if the sheriff has once entered and seized, a subsequent act of bankruptcy before sale comes too late to vest the property in the assignees. It is contended, therefore, that by the seizure of the sheriff the execution is executed. And undoubtedly for the objects and purposes of that statute, the seizure must be taken to be a complete execution of that writ. That statute was passed before the Statute of Frauds, at a time when the property in the goods was bound as against the bankrupt himself, and all claiming under him, by the mere suing out and *teste* of execution. In order, therefore, to obviate the manifest inconvenience which would result if plaintiffs were to lie by and conceal their writs, and afterwards bring them forward when the effects of the bankrupt had been disposed of by the assignees under the commission, by which means they would give a false credit to the trader, which it is the direct object of the 11th section of that statute to prevent, that statute did, for that purpose, compel the plaintiff to put his writ into immediate

* 206 operation, by making the seizure * under the writ the utmost limit of any preference which he could give. But this affords no argument for the general position, that the seizure of the goods, and not the sale, does generally, and in all cases and for all purposes, alter the property. It was a particular provision made to obviate a particular inconvenience. It has further been contended, that the seizure

under the writ is the completion of the execution, because it has been held that an execution is an entire thing, and cannot be superseded after it has once begun, and therefore, if a writ of error is allowed after seizure, but before sale, it is no supersedeas of the execution, but the sheriff must, notwithstanding, sell the goods levied under the execution, and return the money into Court to abide the event of the writ of error. *Meriton v. Stevens* (Willes, 271). It seems, however, to me, that this rule of practice in the Courts affords no grounds for such conclusion. In some of the old cases the Judges appear to have doubted whether the defendant should not have his goods again when the writ of error was allowed after seizure, but before sale, and the reason assigned for the affirmative of that proposition was, "for that before sale the property remains in the defendant." *Shelton's Case* (Dyer, 67 *b* in margin). But in later cases, the Courts have thought it a better exercise of discretion to allow the money to be made under the writ, and brought into Court, to abide the event of the writ of error. In this case, it is to be observed, the suing of the writ of error is the act of the defendant himself, and the object is to deprive the plaintiff of the fruits of his execution, and it is the laches of the defendant himself that he did not bring his writ of error before the seizure, circumstances which make a manifest distinction between this case and that of persons who claim under any conflicting right.

* That the actual sale of property seized under the writ issued at the suit of the subject forms the dividing line, so that where the sale is complete before the awarding of the Crown process the property is protected therefrom, but where it is not completed, the property may be seized thereunder, appears from *Fleetwood's Case*, where the sale of a lease belonging to a Crown debtor, *bond fide*, and without covin, before the award of execution for the King's debt, which is analogous to the *teste* of the writ of extent, was held to be good against the Crown, and that the Crown could not take it in execution; 8 Rep. 171; 2 Roll. Abr. 153. In this case no argument is offered that the seizure alters the property; the whole argument and the judgment of the Court rests on the facts of the actual sale. But, independently of

any argument upon principle, a very long series of cases, from the earliest time down to the present, with the exception of the two cases only which have been so often referred to, viz., *Uppom v. Sumner*, and *Rorke v. Dayrell*, establish the position, that if the subject seizes his debtor's property, either under a writ of execution, a distress, or any other mode which the law allows, for the satisfaction of a debt or demand, and an extent issues at the suit of the Crown while the goods remain in specie, and before any thing is done to change the ownership, it is part of the prerogative of the Crown to treat this seizure as a nullity, and to proceed to the satisfaction of the Crown debt out of the goods so seized. The first authority is *Stringefellow's Case* (3 Ed. 6), the more valuable because it took place but little more than six years after the passing of the Statute 33 Hen. 8, at a time, consequently, when the object and intent of that statute, and the meaning of its provisions, must have been familiar to all the Judges who

* 208 were present at the decision. In that case,* the four Barons of the Exchequer, and two of the Judges, viz., BROMLEY, one of the Justices of the King's Bench, and HALES, one of the Justices of the Common Pleas, were of opinion, that the actual taking of the goods of Brownesoppe, the debtor, by the sheriff, under an *extendi facias* out of Chancery, upon a statute staple, and the seizing them into the hands of the King, but without delivering them to the plaintiff, was no answer to a prerogative writ at the suit of the Crown out of the Exchequer, but that the sheriff was bound out of such goods to satisfy the King's debt. And the reason assigned by the reporter for the opinion of the Judges is, "because the property in goods and lands was not in Stringefellow before they were delivered to him by the *liberate*." It has been said, however, that this case is to be considered as subject to doubt on account of the *quære* subjoined to it by the reporter. But it is to be observed, on the other hand, that Rolle inserts the case in his Abridgment (2 Roll. Abr. 158) without the *quære*, expressly stating, "that the sheriff ought to execute the extent for the King's debt, because the property of the goods and lands was not in Stringefellow before they were delivered to him by a writ of *liberate*, and

therefore liable to the King's extent;" and that Lord HOBART, in *Sheffield v. Radcliffe* (Hob. 389), affirms the case to be law. Again, TREBY, C. J., in a marginal note to the report, states, that the Barons of the Exchequer agree that this case is law; and the case itself is cited, and relied upon as law in *The King v. Cotton* (Parker, 112), where the Chief Baron, in the very elaborate and able judgment upon that case, states, "that he will show *Stringefellow's Case* to be undoubtedly law." And amongst other instances in which he states it to be recognized, he mentions, that Lord HARDWICKE, when * Chief Justice, in delivering the resolution of the * 209 Court of King's Bench in *Brassey v. Dawson*, Mich., 6 G. 2, cited and relied upon *Stringefellow's Case* as clear law, and said it was grounded on the general rule of preference allowed by law to the King's debts. The case itself last referred to of *The King v. Cotton*, which was decided in 1751, was determined on the very same principle which applies to the present case. In that case the goods of Chapman, the King's debtor, were seized under the distress for rent on the 12th of October. On the 14th of October, after the seizure, but before the sale, the extent issued. The Court of Exchequer held that the property in the goods was not altered by the distress, but until the time of actual sale remained in the King's debtor, and was liable to the operation of the writ of extent. How can any real distinction be made between the landlord seizing the goods for the purpose of making his rent by a subsequent sale, and a sheriff seizing under a *fi. fa.* for the purpose of making the plaintiff's debt by a subsequent sale? Or if there is any distinction, is it not stronger in favour of the landlord, who might reasonably be supposed to have acquired a special property when he seized for his own benefit? Indeed, both the argument and judgment in that case proceed on the assumption that the present case is in favour of the Crown, and that it could not be disputed but that the extent would operate upon goods seized by the sheriff, but not yet sold. Again, in *The Attorney-General v. Capel*, determined in the Exchequer in 1686 (2 Show. 481), where the extent was tested the 24th of December: after a commission of bankrupt had issued against the debtor, but

before the assignment made by the commissioners, it was held by the Court, that if the extent comes before the
 * 210 assignment, it shall and must be preferred; * and the case of *The King v. Crump and Hanbury* is cited and relied upon as an authority in point, to which the reporter adds this observation: "Extents have been held good that have been made upon goods actually levied by virtue of a *feri facias*, and in the sheriff's custody, the extent coming before a bill of sale, made so as the property was not altered."

These two cases, therefore, are direct authorities; the one, that in the case of a distress, where goods are *in custodia legis* after the seizure, but before the sale; and again, in the case of a bankrupt, where goods are also *in custodia legis*, between the seizure by the messenger and the actual assignment by the commissioners; still the goods of the King's debtor are subject to an extent at the suit of the Crown, tested before the actual sale under the distress, or before the actual assignment to the assignees; and the just inference would seem to be, that in the case of a seizure by the sheriff under a *fi. fa.*, where the goods are also *in custodia legis*, an extent tested before the sale ought to be entitled to the same operation. But *Stringefellow's Case*, acknowledged as it has been in various and repeated instances, and by the most eminent Judges, is a direct authority upon the very point now under discussion. And since that decision various other cases have been decided in the same way, and after great argument by the Court of Exchequer: I refer particularly to *The King v. Wells and Allnutt* (16 East, 278, in a note), in 1805, and to the case of *Rex v. Sloper and Allen* (6 Price, 114), where the Exchequer acted on the authority of the latter case.

The only two cases which have received a contrary decision are those before referred to, viz. *Uppom v. Sumner* (2 W. Bl. 1251), in Easter term, 1779, by the Court of
 * 211 Common Pleas; and *Rorke v. Dayrell*, * (4 T. R. 402), in 1793, by the Court of King's Bench; cases undoubtedly entitled to great respect when the authority of the eminent persons by whom they were adjudged is taken into consideration. I say these two cases only have received a contrary decision, for I cannot consider the case of *Lech-*

mere v. Thorowgood and another (3 Mod. 236), which is sometimes cited, to be an authority upon the present question between the Crown and the subject. That was an action of trover by the assignees of a bankrupt against the sheriff, who had entered under a *fi. fa.*; and upon a special verdict one of the questions was, whether the *fi. fa.* was well executed, the sheriff having seized, though not sold, under the writ before the commission of bankrupt had issued? and upon that question, it was held that the *fi. fa.* was well executed; so that the assignees of the bankrupt's estate could not have a title to those goods which were before taken in execution, and therefore *in custodia legis*. So far, undoubtedly, the case is an authority. But it was further stated in the special verdict, that after seizure under the *fi. fa.*, and before any *venditioni exponas*, viz., the 4th of May, an extent in aid issued, whereupon parcel of the goods mentioned in the declaration was seized by the sheriff upon the same extent, and sold, and the money paid to the creditor. And one question stated by the reporter is, whether the extent did not come too late, and he says it was held that it did. Now, upon this point the case cannot be an authority, for the priority between the extent and the *fi. fa.* was perfectly immaterial to the plaintiffs in that action; they were out of Court upon the title of the judgment creditor. All further discussion was *res inter alios acta*. No one appeared for the Crown; no argument took place before the Court on behalf of the Crown. The only inference to be drawn from that * case is, that the plaintiffs, the assignees, had no right * 212 against the judgment creditor; but whether the Crown, who had received payment out of part of the goods seized, had such right or not, is left undetermined, and indeed untouched. The question, therefore, is, whether the two cases above referred to are of such authority as to overturn the decisions which, both before and since, have been given by the Court of Exchequer. These two cases, as I have already observed, are decided partly upon the ground that the property in the goods is altered by the seizure under the *fi. fa.*, and partly upon the ground that, by the Statute 33 Hen. 8, c. 39, such restriction was put upon the King's prerogative

that the preference now contended for ceased to exist. And these are the only grounds upon which these cases are rested.

As I have already stated the reasons for the opinion which I have formed, that no alteration takes place until the actual sale under the *fi. fa.*, I shall confine my remaining observations to the considerations of the second point in this case, viz., the Statute of Hen. 8. By the 33 H. 8, c. 39, § 74, it is enacted, "That if any suit be commenced or taken, or any process be hereafter awarded, for the King, for the recovery of any of the King's debts, the same suit and process shall be preferred before the suit of any person, and the King shall have first execution against any defendant of and for his said debts before any other person; so always that the King's said suit be taken and commenced, or process awarded, for the said debt, at the suit of the King, before judgment given for the other person." That this clause of the statute is not to be interpreted according to the strict letter of it has been at all times admitted. Taken literally, it would give the

* 213 subject a greater advantage * against the execution at the suit of the Crown than he possessed against that of any subject. If the subject has obtained judgment before the *teste* of an extent, such judgment, according to the letter of the statute, would postpone the Crown's remedy under the extent to an unlimited time, whereas the same judgment would have no operation whatever against an execution at the suit of a subject, even though issued in a suit which was commenced after such judgment was signed. In the case of the Crown, the subject's judgment would give him the preference, though his execution were last in point of time.

In the case of a subject, the first execution against the goods must be preferred. The exact literal sense of the statute must therefore be departed from; and, if that sense is once given up, we are at liberty to adopt that which appears to be the nearest to the letter of the statute, and at the same time which best carries into effect the object and intention of the legislature. For this purpose, it should be considered, what the exact state of the prerogative of the Crown was at the time this statute was passed, in order that we may be the better able to judge how much of it was

intended to be abolished by the statute. By the ancient prerogative of the Crown, as stated by Lord COKE, in 1 Inst. 131 b, "The King was to be preferred in payment of his duty or debts by his debtor before any subject, although the King's debt or duty be the latter; and the reason hereof is, for that 'thesaurus regis est fundamentum belli et firmamentum pacis.' And, thereupon, the law gave the King remedy by writ of protection to protect his debtor, that he should not be sued or attached until he paid the King's debt." So the law remained until the Statute 25 Ed. 3, c. 19, which was introduced, as Lord * COKE says, "from the incon- * 214 venience that grew, that for to delay other men of their debts, the King's debts were the more slowly paid." By that statute it was enacted, "That notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's Court by their debtors; and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till *grec* be made to the King of his debt; and if the creditors will undertake for the King's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due and adjudged to them, and also shall recover against them as much as they shall pay to the King for them." The law, therefore, at the time of passing the Statute Hen. 8, was, that although the King granted his protection to his debtors, the subject might nevertheless sue his debtor, and continue his suit to judgment; but still the execution was suspended until the King's debt was paid. The Crown, therefore, might still postpone the execution of the subject to an unlimited time, simply by delaying to take out execution in its own suit; but by the Statute of Hen. 8, this power of the Crown to postpone the execution of the subject's judgment to an unlimited time is taken away, except in one single case, viz., where the suit of the Crown is commenced before the judgment has been obtained by the subject. In that case, I consider the old prerogative still remains. Since the statute, therefore, where the Crown has commenced its suit before the subject's judgment, there can be no race between the Crown and the subject which shall sue out the

first execution ; the debt of the Crown must be first satisfied before the subject can execute his writ. But where

* 215 the Crown has not * commenced its suit, or awarded its process, before the subject's judgment is signed, there the field is open both to the Crown and the subject ; and if the subject can first complete his execution before the Crown issues its writ, he may enjoy the fruit of it. Still, however, even in this case, if the execution of the Crown is concurrent with that of the subject, if it is actually issued before the subject's execution is complete, the Statute of Hen. 8 does not provide for the case, but leaves the old common law rule to operate, "*quando jus domini regis et subditi concurrunt, jus domini regis preferri debet.*" The rule of law has always been, that the prerogative of the Crown cannot be taken away except by express and unambiguous words ; but it is difficult to find any words in the statute which apply to two writs of execution in competition with each other, one at the suit of the Crown, the other at the suit of the subject. It is enough, however, to say it is left in doubt : for at the time in which this statute passed it is impossible to believe such a prerogative was abandoned by the Crown if there are no express words to show the intention. After all, the important point is, that the line should be distinctly drawn, and well defined, which forms the boundary between the right of the Crown and the right of the subject, with respect to executions of the subject's judgments. It is admitted on all hands, that if the extent issues before the seizure, it is entitled to the preference. Suppose the sheriff actually seizes, and the extent then issues, and the law says, that as it issued before the sale, it is to be preferred, the expense of the entry and execution will not fall upon the plaintiff in the action, for his debt has not been levied ; those

expenses will be allowed by the Exchequer upon pay-

* 216 ment of the King's debt. The only consequence * is, that the subject discovers, a very few days later, that his execution cannot be satisfied until the Crown debt is paid. For these reasons, the opinion which I have formed upon the first question proposed to us is, that the actual sale under the *fi. fa.* forms the dividing line between the right of the

Crown and the right of the subject; and, consequently, that the extent is, in the present case, to be preferred to the writ of *f. fa.* issued at the suit of the subject.

Upon the second question proposed by your Lordships, I shall say no more than that it appears to me to make no difference whether the extent is an extent in aid or an immediate extent at the suit of the Crown; all the authorities agreeing that the same privileges extend to the one which belong to the other.

I have the authority of Mr. Justice PARK, who is unavoidably absent on this occasion, to express his entire concurrence with the opinion formed by the majority of his Majesty's Judges.

LORD TENTERDEN. — My Lords, in the case between Daniel Giles, the late sheriff of the county of Hertford, plaintiff in error, and Harry Grover and James Pollard, defendants in error, which was argued some time ago before your Lordships, the learned Judges have given their answers to certain questions that were proposed to them by the House. By these answers a very great majority of the Judges coincided in that opinion upon which I propose to submit to your Lordships that the judgment of the Court of Exchequer should be affirmed, two only being of a different opinion. The case may be shortly stated thus: An execution having issued at the suit of a subject, the sheriff took possession of the goods of the debtor, but before he made any disposition of those * goods by bill of sale to the creditor, or in any * 217 other way, an extent came at the suit of the Crown; and the question is, whether an extent thus coming at the suit of the Crown, while the goods remain in the hands of the sheriff, is to be preferred to the execution taken out by the subject. The majority of the Judges on the question proposed are of opinion in the affirmative, namely, that the Crown's extent should be preferred. It is in conformity with that opinion, in which I most heartily concur, and have long entertained — for the subject is by no means new in the Courts of Justice — that I shall take the liberty of delivering my opinion, that the judgment of the Court of Exchequer should be affirmed.

As I have already stated, the question has arisen more than once in Courts of Law ; and there are two recorded decisions, in two cases so often alluded to, upon the subject, one, the case of *Uppom v. Sumner*, decided in the Common Pleas several years ago ; and the other, the case of *Rorke v. Dayrell*, decided in the Court of King's Bench, after the determination of the other case. Not to notice the prior decisions in the Court of Exchequer, it may be sufficient for the present to say, that there have, since the last of them, namely, the decision of *Rorke v. Dayrell*, by the Court of King's Bench, been two or three in the Court of Exchequer to the contrary of those two prior decisions.

Your Lordships well know that the Barons of the Court of Exchequer are very peculiarly conversant with the revenue of the Crown. It is their peculiar duty to attend to and enforce the rights of the Crown against the subject as connected with that revenue.

[The two cases which are reported, and which are against the rights of the Crown, appear to have proceeded
 * 218 * upon two grounds ; one ground was, that by the seizure of the sheriff the property of the goods was divested out of the debtor ; another ground was, that, according to the true interpretation of the statute passed in the time of Henry 8, the execution of the Crown was not to be preferred.

Now, with regard to the first point, namely, the supposition that the property was divested out of the debtor by the seizure of the goods, by the act of the sheriff in seizing the goods, it appears to me, upon due consideration, and so the majority of the Judges thought, that the proposition could not be maintained. Property cannot be divested out of one person without being vested in another ; and it is impossible to say in whom the property does become vested, if the investment be taken out of the debtor. It has been argued that the property is vested in the sheriff, because there are authorities to show that the sheriff, if the property be taken out of his hands, may maintain an action of trover against the wrong-doer. These actions are maintainable upon a ground perfectly distinct from the right of property ;

they are maintainable upon the ground of possession; any man in possession of goods, whether as the bailee or otherwise, may in his own name maintain an action against any party who shall deprive him of the possession. The power, therefore, of bringing an action of this kind does by no means prove that the property is in the sheriff.

It has been supposed by some that the property is in the judgment creditor; but it is perfectly clear, upon consideration of the subject, that the judgment creditor has no property in the goods while they remain in the hands of the sheriff. If the sheriff executes the process of the Court, and makes a bill of sale to the plaintiff in the action, then the judgment creditor obtains the property; but * 219 until that is done, while the goods are in the possession of the sheriff, they are in the custody of the law, but still remain the property of the debtor to whom they originally belonged. If the property were divested some ceremony would be necessary to revest it; but there is no such ceremony. If the debtor pays the money to the sheriff, the sheriff withdraws; he executes no conveyance; he does not even go through any ceremony; but all he does is to withdraw, and leave the goods where they were. It appears to me, therefore, that putting the case shortly upon that ground of a supposed divesting of the property, it can by no means sustain the two cases which I have referred to, and which were decided against the right of the Crown.

It remains to consider the effect of the statute upon which so much reliance was placed. That was the statute passed in the reign of Henry 8; and upon the first view of it, considering that statute by itself, and without regard to the state of the law as it previously existed, it might seem that the argument founded upon it was correct. By that statute it is enacted, "That if any suit be commenced, or any process be hereafter awarded, for the recovery of any of the King's debts, the same suit and process shall be preferred before the suit of any person or persons, and the King, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debts, before any other person or persons; so always that the King's suit be taken and com-

menced, or process awarded, for the said debt, at the King's suit, before judgment given for the said other person or persons."

As I have already intimated, if that statute were read without regard to the state of the law as it existed

* 220 * at that time, it certainly would furnish an argument against the right of the Crown; but that Act of Parliament, like every other, is to be construed with regard to the state of the law as it previously existed; and so construing that statute, it will be found not to apply to a case like the present.

By the common law, the King had a right of preventing any subject from suing any of his debtors; it was the practice, and it was a right which was sometimes exercised, of granting to those who were his debtors a protection, which prevented any of his subjects from bringing any suit against them. Thus the law stood until an Act of Parliament passed, which I shall draw your Lordships' attention to, namely, the Statute of the 25 Ed. 3, c. 19. That statute shows what the law was before it was passed, and introduces an alteration in favour of the suitor; and it is in these terms: "Forasmuch as our Lord the King hath made before this time protections to divers people which were bounden to him in some manner of debt, that they should not be impleaded of the debts which they owed to others till they had made satisfaction to our Lord the King of that which to him was due by them by reason of his prerogative; and so during such protections no man hath dared to implead such debtors." Your Lordships will observe that the preamble recites the law to be as I have stated it, namely, that the King by his protection was in the practice and had a right to prevent any person from commencing any suit against his debtor; then it goes on to enact, "It is accorded and assented, that notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's Court by the debtors; and if judgment be thereupon given

* 221 for the plaintiff or demandant, the execution * of the same judgment shall be put in suspense till satisfaction be made to the King of his debt. And if the creditors will undertake for the King's debt, they shall be thereunto

received, and moreover shall have execution against their debtors of the debt due to them, and also shall recover against them as much as they shall pay to the King for them." This statute therefore so altered the law as that it enables the subject to bring an action against his debtor, although he be a debtor to the Crown, which before he could not do; but nevertheless it prevents him from taking out execution unless he first satisfies the debt of the Crown. This was the state of the law before the passing of the statute to which I have referred, namely, the Statute of 33 Hen. 8. The subject might commence an action, and might have proceeded even to judgment, but could have no execution without satisfying the King's debt. All, therefore, that the Statute of Hen. 8 does, is to allow a party to have execution without satisfying that debt; it authorizes him to take out his writ, but does not apply to a case in which there are conflicting executions, which is the case in question. If it should be taken literally, that the King should not have execution unless his suit were commenced before a judgment given for the subject, the consequence would be, that the subject might obtain judgment against the King's debtor, and forbear taking out execution for a considerable length of time, and during all that time prevent the Crown from recovering its debt by taking out execution; that would be open to collusion on the part of the subject, and operate to the great prejudice of the King's revenue and his rights. I am therefore of opinion, that the true effect of this statute is to allow the subject to obtain * judgment, and even to sue out execution, * 222 without first making satisfaction to the King; but, nevertheless, to leave the law in all other respects as it stood before; namely, if the King's execution comes while the goods remain the property of the debtor—and, as I have already stated, my opinion is, that they do remain the property of the debtor, although they be taken possession of by the sheriff—the King's execution shall prevail. The contrary of that has been decided in the two cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*; but there are two or three decisions of the Court of Exchequer in accordance with my view of the subject. I do not know that it is necessary to trouble your

Lordships with referring to these cases ; they were very much considered in the Court of Exchequer, and the decision in one of them afterwards became the subject of inquiry in the Court of King's Bench. The case is reported by the name of *Thurston v. Mills* ; the point of law, which is the question in the present case, was twice argued before that Court, and a third time upon a question preliminary to the question argued on the two first occasions, and which was really the question in the cause. Upon that preliminary question, which regarded only the form of the action, the Court of King's Bench decided against the plaintiff. The main question was there left untouched ; but I think it may be collected, though not very clearly, that the opinion at least of some of the judges who sat in the Court at that time, Lord ELLENBOROUGH being at the head of them, and Mr. Justice LE BLANC being one of them, was in favour of the Crown. I cannot assert positively that it was so ; but in reading the report of the case, and from my own recollection of the questions introduced into the argument of it, I am strongly inclined * 223 to think that it was so, and I formed that opinion at the time.

The ground upon which those two decisions of *Uppom v. Sumner*, and *Rorke v. Dayrell*, have proceeded, as to the divesting of the property out of the debtor and vesting it in another, failing, in my opinion, and the argument also that was founded upon the construction of the Statute of Hen. 8, failing, on a due consideration of that statute with regard to the law as it existed before, my opinion is, that the Crown has a right of priority in this case before the subject ; and, consequently, that the judgment of the Court of Exchequer must be affirmed. I should further say, that, according to the practice at the time, although the law has since been altered, the judgment of the Court of Exchequer in this case was removed by a writ of error, and argued before the Chief Justices of the King's Bench and of the Common Pleas, of whom I was one, and my Lord WYNFORD the other : we did not come to the same conclusion upon that occasion, and, therefore, we affirmed the judgment, understanding and meaning that the question, which was one of great importance, should be brought to this

House: I have since conferred with my Lord WYNFORD upon the subject, and I have learned from him that he is now perfectly satisfied with the opinion which I have ventured to give to your Lordships, and by which I affirm the judgment of the Court of Exchequer.

Lord BROUGHAM, C., after reviewing the cases, said: I certainly entertain a strong opinion that the judgment of the Court of Exchequer in this case is right, and ought, by your Lordships, to be affirmed. I entirely go along with the opinions pronounced by the *majority of the learned * 224 Judges, in answer to the questions put to them. It is of much more importance that this question should be settled, than it is in which way it shall be settled.

Judgment affirmed.

WRIT OF ERROR.

FROM THE COURT OF KING'S BENCH.

MELLISH v. RICHARDSON.

1832.

WILLIAM MELLISH *Plaintiff in Error.*
 GEORGE RICHARDSON *Defendant in Error.*

Practice.

This House will not postpone the hearing and decision of any appeal on account of the absence of counsel, but will call on the counsel on either side in attendance to proceed with the argument.

A Court of Law has authority over its own record, which it may amend, even after error brought.¹

A Court of error will not inquire into the propriety of amendments made

¹ "Every Court is the guardian of its own records, and master of its own practice." TINDAL C. J., in *Scales v. Cheese*, 12 M. & W. 687; see *Rugg v. Parker*, 7 Gray, 172; *Balch v. Shaw*, 7 Cush. 282; *Fay v. Wenzell*, 8 Cush. 815.

in the Court below, but, though such amendments be made after error brought, will consider them as part of the original record subjected to their revision.¹

June 25, 27.

THIS was a writ of error brought by the defendant below from a judgment of the Court of King's Bench at Westminster, affirming a judgment of the Court of Common Pleas at Westminster, in favour of the plaintiff below.

The declaration was on a special contract, and contained four special counts and the money counts.

The defendant pleaded the general issue. The cause * 225 was tried at the London sittings after Hilary * term, 1824, before the Right Hon. Lord GIFFORD, then Lord Chief Justice of the Court of Common Pleas, and a special jury, and a verdict was recorded for the plaintiff on all the counts, with 7500*l.* damages.

Judgment was given for the plaintiff by the Court of Common Pleas upon the whole declaration, after a motion for a new trial or in arrest of judgment, for the damages, and 274*l.* taxed costs.

A writ of error was brought in the Court of King's Bench; special errors were assigned, and the case was argued at the sitting before Michaelmas term, 1825.

Before the Court of King's Bench gave any judgment, the plaintiff below applied to the late Lord GIFFORD, then Master of the Rolls, to amend the *postea*, by entering the verdict for the plaintiff on the first count only, but his Lordship declined to interfere, as he doubted whether he had any authority, having ceased to fill the office of Chief Justice, but he certified to the Court, that he should have made the amendment had he possessed the authority to do so. On the 10th of November, 1825, a rule *nisi* was granted by the Court of Common Pleas for amending the *postea*.

On the 24th of November, the rule was made absolute, and the *Nisi Prius* record was amended accordingly; and on the

¹ See *Ferrier v. Howden*, 4 Cl. & Fin. 32; *Scales v. Cheese*, 12 M. & W. 685; 13 L. J. Exch. 167; 2 H. L. Cas. 415; *Ordroneaux v. Prady*, 6 Serg. & R. 510; *Clymer v. Thomas*, 7 Serg. & R. 180; *Newlin v. Palmer*, 11 Serg. & R. 101; *Glazier v. Lawrie*, 8 Serg. & R. 498; *Haynes v. Morgan*, 3 Mass. 208; *Guilford v. Adams*, 19 Pick. 376.

next day a rule *nisi* was obtained from the Court of Common Pleas for amending the judgment-roll, conformably to the amended *postea*, which rule was made absolute on the 26th of November, and the judgment-roll remaining in the Common Pleas was amended accordingly.

While these proceedings were pending in the Common Pleas, namely, on the 25th of November, the Court of King's Bench gave judgment upon the original *transcript, reversed the judgment of the Court of Common Pleas, and directed a *venire de novo*, intimating an opinion, that the first and second counts of the declaration, which set forth the whole of the agreement between the parties, were good, but that there was not a sufficient consideration to support the third and fourth counts. That reversal was entered of record on the next day.

Upon the amendment being made by the Court of Common Pleas, an application was made to the Court of King's Bench to amend the transcript; and the Court of King's Bench, in the same Michaelmas term, 1825, amended the transcript in the same way, and gave judgment for the plaintiff below, affirming the judgment of the Court of Common Pleas, with 10*l.* 10*s.* for the costs in error.

Upon this judgment the defendant below brought the present writ of error.

June 25.

Upon counsel being called to the bar, *Mr. Campbell* appeared on behalf of the defendant in error, and stated to their Lordships that there was no counsel present for the plaintiff.

The agent for the plaintiff said that he had taken every possible means to insure the attendance of counsel, but that he had been unable to do so, on account of their being engaged in very important business elsewhere, and he expressed a hope that their Lordships would allow the case to stand over.

Mr. Campbell could not consent to any further delay.

Lord TENTERDEN said, that it had never been the practice of that House to allow causes to stand over on account of the absence of counsel. Other Courts might do so for the convenience of that House, but that House could not do so for

their convenience. He remembered an instance in * 227 which, when at the bar, * he had been engaged in a cause in the Court of King's Bench, and on the day appointed for the trial, an appeal, in which he had been retained as counsel, came on to be heard in that House; he mentioned the circumstance to Lord ELLENBOROUGH, who at once allowed him to quit the Court of King's Bench, in order to proceed with the argument before that House. He did not, however, think it was fit to dismiss this appeal under the circumstances that now appeared, and he should therefore move their Lordships, that the counsel for the defendant in error should proceed with the argument.

The motion was agreed to.

Mr. Campbell, for the defendant in error. — The House had no right to look beyond the amended judgment of the Court below, but were bound by the amended roll. If so, then the plaintiff in error must fail, for the unanimous opinion of both Courts below had been in favour of the original plaintiff upon the first counts of the declaration. The argument for the plaintiff in error must be, that the Court of Common Pleas had no authority to amend the *postea*, for that the writ of error having removed the record from their Court, their power over it was gone. The Court of Common Pleas had the power to amend the *postea* and judgment, which still remained with them, as they only sent up the transcript of the record to the Court of King's Bench. When they had so amended their own record, and the Court of King's Bench had been informed of the amendment, the latter Court was bound, *ex debito justitiæ* to amend the roll there, and to give judgment for the defendant in error. The amendment of the *postea* was only an amendment of a misprision of the clerk, which was authorized by the 8 Hen. 6, c. 12. Under that and other * 228 similar statutes * the Courts had long since adopted the practice of amending the *postea* by the Judge's notes. To show that amendments of a *postea* and a judgment might be made after writ of error brought, he cited *Petrie v. Hannay*, 3 T. R. 659; *Doe v. Perkins*, 3 T. R. 749; *De Tastet* [186]

v. *Rucker*, 6 Moore, 135; 3 Br. & Bi. 65, and 9 Price, 432; *Henley v. The Mayor of Lyme Regis*, 6 Bing. 100; *Doe v. Dyball*, 1 Moore & Payne, 330; *Friend v. The Duke of Richmond*, Hardr. 505; where HALE, Chief Baron, said it was the constant practice after error from that Court for the record to be amended there, and the same amendment to be afterwards made in the Court of error: *Wood v. Matthews*, Poph. 102; *Anonymous*, Sir W. Jones' Rep. 9; *Anonymous*, 2 Roll. Rep. 471; *Grenville v. Smith*, Cro. Jac. 627; *Ann Healings v. The Mayor and Commonalty of the City of London*, Cro. Car. 574; *Anonymous*, Salk. 49; *Meredith v. Davies*, Salk. 269; *Frankland v. Reeve*, Cas. Temp. Hardw. 118; *Foster v. Black*, Barnes, 7; *Tully v. Sparkes*, Strange, 869; *Short v. Coffin*, 5 Burr. 2730; *Rees v. Morgan*, 3 T. R. 349; *Pickwood v. Wright*, 1 H. B. 642; *Usher v. Dansey*, 4 M. & Sel. 94; and *Free v. Burgoyne*, in that House (mentioned by Mr. Campbell as a case in which he had been concerned), and which was a writ of error from the Court of King's Bench. In that case it did not appear that the party below had asked for costs. The Lord Chancellor (LYNDHURST) said, that the Court below would amend the record, and that House would afterwards amend the transcript accordingly. The counsel, in consequence of that intimation, did not press their objections. *Dunbar v. Hitchcock*, 3 M. & Spl. 591, was also a decisive authority for the defendant in error. There an amendment was made by the Court of King's Bench after the record had been removed to that House, and an amendment too which the Court of Common Pleas, where the case was originally tried, had considered as one of substance, and not a mere misprision of the clerk. Even that Court, however, in at first refusing the amendment (5 Taunt. 820) had impliedly admitted that if the matter to be amended had been only a misprision of the clerk, they would have made it, though after error brought in the Court of King's Bench. There was no pretence for saying that there was any distinction between the Courts of King's Bench and Common Pleas as to the power they possessed over their own records. It had been said that on error from the Court of King's Bench into the Exchequer Chamber or House of Lords, only the tran-

script of the record was sent up, but that on error from the Common Pleas into the King's Bench, the original record itself was sent. That was not so in practice, for in all cases of error from any of the superior courts, the transcript only was sent to the Court of error. The law too was the same as to both, for the 27 Eliz. c. 8, which gave the writ of error from the King's Bench to the Exchequer Chamber, required that the record itself should be removed. That statute enacted, that the party against whom judgment was given in the King's Bench, might "sue out of the Court of Chancery a special writ of error directed to the Chief Justice, commanding him to cause the record, and all things concerning the judgment, to be brought before the Justices of the Common Bench and Barons of the Exchequer;" and according to the forms given in Tidd's Appendix, c. 44, §§ 10 and 15, the writs of error from the Common Pleas to the King's Bench, and from the latter Court to the House of Lords, were in * 230 the same words. The King's Bench always * possessed authority over its own records, and so did the Common Pleas, and the distinction now attempted to be set up was utterly without foundation. If the authority of the cases quoted was not denied, their Lordships had only to look at the first count of the declaration, which was fully proved, and on which the verdict and judgment were now entered, and against which there was no pretence for alleging error.

LORD TENTERDEN. — My Lords, a great doubt has arisen in my mind, how far this House can take notice of the rules and orders of the Courts below. Your Lordships look only to their judgments, and not to any interlocutory matter that may be brought before them. That is the point on which, if it be your Lordships' pleasure, the counsel for the plaintiff in error shall be heard. I entertain great doubts upon it. I have a strong opinion that no consent or agreement of the parties themselves can bind this House, nor can any agreement of the Judges in the Courts below have that effect. It appears that the Court of King's Bench (see the judgment of the Court of King's Bench, delivered by Mr. Justice BAYLEY, 7 B. & C. 835) have agreed to state the facts on the record, "in order

that a court of error may have the opportunity of considering whether the amendment we have required to be made, ought to be made or not." If the Judges of the Court below think proper to do what they conceive will give jurisdiction to this House, they may do it, but that will not alter the real jurisdiction of the House, nor will it alter the nature of the question that arises on the circumstances submitted to your Lordships' consideration. That question seems to me properly to be, whether a court of error can inquire into the propriety of any amendment made by an inferior court in its own * record, and to which question I think the * 231 attention of counsel ought to be directed.

The case was allowed to stand over for two days, when it was argued by

June 27.

Mr. Barnewall, for the plaintiff in error. — There are two points in this case, first, whether the Court of Common Pleas had the power to amend the *postea*, after the signing of judgment, and also to amend the judgment-roll, by altering the verdict; secondly, whether, if that Court had that power, the Court of King's Bench was bound to make the like alterations. At common law no amendment could be made after final judgment, and entry thereof on the record; *Marriot v. Lister*, 2 Wilson, 147. The power, therefore, to amend the record, after judgment signed, is derived from the Statute of Amendments, 8th Hen. 6, c. 12, and it is confined to the misprision of the clerk of the Court. The question in this case, then, is this, were the errors on this record caused by the misprision of the clerk or by the acts of the parties? It was no misprision of the clerk, but the fault of the plaintiff below, that bad counts were put on the record. It was no misprision of the clerk when he entered the verdict generally, or as he was directed. The errors here, therefore, being caused by the act or omission of the party, from which the misprision of the clerk was distinguished, *Green v. Rennet*, 1 T. R. 782, was not amendable by the Statute of Hen. 6th; *Mason v. Fox*, Cro. Jac. 681; Vin. Ab. tit. *Amendments*; and the cases there collected from Bro. Ab. These authorities were perfectly consistent with the cases cited on the other

side, for every one of the latter applied to amendments of the record before judgment, or amendments for misprision of the clerk after judgment. The entry of the verdict found by

the jury upon all the counts, was no misprision of the
 * 232 * clerk, but the fault of the plaintiff below, who
 might have directed it to be entered on the first count

only at the time it was given, or moved the Court of Common Pleas to order it to be so entered before judgment. The general rule, as to amending the *postea*, when the jury give general damages, on a declaration consisting of several counts, and one or more of them is defective, is established by the case of *Eddowes v. Hopkins*, Doug. 377-8; and by the rules of M. 1654, sect. 21, K. B. and 1654, C. P. Barnes, 478. Willes, 443, and 1 T. R., 542; and, by the particular cases determined according to the above rules, as *Grant v. Astle*, Doug. 722; *Spencer v. Goter*, 1 H. Blac. 79; *Cook v. Cox*, 3 M. & Sel. 110; *Dunbar v. Hitchcock*, 1 Marsh. 382; 5 Taunt. 820, S. C.; *Reece v. Lee*, 7 Moore, 269. Insufficient pleadings, or any act of the party, or of his counsel, or of the Judge, or Court, are not amendable after judgment; *Blackamore's Case*, 8 Rep. 310; *Mason v. Fox*, Cro. Jac. 631; and *Green v. Miller*, 2 B. & Ad. 781; in which last case the Court said that they could not amend after judgment, except for misprision of the clerk. If their Lordships should affirm the amendments in this case, every Court in Westminster Hall will be at liberty henceforward to repeal the Statute of Amendments. But it is contended that this House is to look only at the record as it is brought before them in its amended form, and that the appellant is estopped from showing how it stood originally in the Court of Common Pleas. There was no ground for such an argument; the amendments were made without the consent of the plaintiff in error, and therefore there was no estoppel, which is where a person is concluded by his own act or acceptance; Co. Lit. 352, a., Com. Dig. tit. *Estoppel*. The truth appeared by this record to be, that these amendments of the *postea* and judgment-roll were made by the Court of Common Pleas,

* 233 not only * after final judgment was entered up, but
 also after the record of the judgment had been re-

moved by writ of error to the Court of King's Bench, and while the same remained in that Court. By the Statute 8 Hen. 6, c. 1, amendments are to be made by the Judges of the Courts in which the record is, by way of error or otherwise, according to their discretion. The Judges of the Court of error were bound to exercise their judgment, whether the error sought to be amended arose from the misprision of the clerk. There was a distinction between proceedings on writs of error in these Courts: when a writ of error was brought in the King's Bench, on a judgment in the Common Pleas, the record itself, and not merely a transcript of it, was removed into the former Court, except in the case of a fine; Year Books, 40 Ass. 29, 22 Ed. 3, 6, pl. 24; Fitz. Nat. Brev. tit. Writ of Error, 20 F; 1 Rol. Abr. tit. Error, 752-3; 3 D'Anv. Abr. tit. Error, P. a; Vin. Abr. tit. Error P.; Bac. Abr. tit. Error, B. 2, and Com. Dig. tit. Pleader, 3, B. 18; the case of *Andrews v. Lord Cromwell*, Cro. Eliz. 891; the *Dean of Carlisle's Case*, Godb., 375, and *Coot v. Lynch*, 1 Lord Raym. 427, Cowp. 843. The record, therefore, according to those authorities, could not be in the Court of Common Pleas, where the amendments were made. The judgment which had been entered upon that record was reversed by the Court of King's Bench, and that reversal was entered of record in that Court before the judgment-roll was amended in the Court of Common Pleas, which amendment was not made until after a lapse of several terms, contrary to the case of *Harrison v. King*, 1 B. & Ald. 161. It appears by the record that two different and inconsistent judgments were given by the Court of King's Bench, one by which the judgment of the Court of Common Pleas was ordered to be reversed, the other by which it was affirmed, and the latter was given after * the first was entered up; all * 234 which was contrary to the authorities before referred to. The Court of King's Bench was not bound to follow the amendments made by the Court of Common Pleas; and the judgment of the former Court, reversing that of the latter, ought to be affirmed.

LORD TENTERDEN. — This case appears to me to resolve

itself into this question, whether it is competent for a Court of error to examine the propriety of an amendment of the record of the Court below, on the order for the amendment being sent up as part of the record? If the Judges shall be of opinion that it is not competent for a Court of error so to do, the judgment of the Court below must be affirmed without further discussion; but, if they doubt upon that point, then they will consider, whether, supposing it to be competent for a court of error to inquire into these amendments, that which has been made in the Court of Common Pleas in this case is right.

The Lord Chancellor put these questions in form to the Judges. The House then adjourned for some time, during which their Lordships went up to present an address to the King on his escape from the attack made on his Majesty at Ascot Heath. On the return of their Lordships, Lord TENTERDEN, in the absence of the Lord Chancellor, sat as Deputy Speaker.

MR. BARON BAYLEY delivered the following judgment:— In the absence of my Lord Chief Justice TINDAL, it devolves on me to give the answer of the Judges to your Lordships' questions, which are these: First, whether it is competent to a Court of error to examine the propriety of an amendment of the record made by the Court below, being a Court of record, the order for the amendment being sent up as part of the record? Secondly, whether, supposing it to be
 * 235 * competent, an amendment made by the Court of record in which the action was originally brought, in the manner and under circumstances similar to those stated in the case of *Mellish v. Richardson*, would be lawfully made?

Upon the first of these questions, his Majesty's Judges are of opinion, that it is not competent to a Court of error to examine the propriety of an amendment of the record made by the Court below, being a Court of record, although the order for the amendment is sent up as part of the record. The proper object of a writ of error is to remove the final judgment of the Court below, for the revision of the

superior Court, in order that such Court, from the premises contained in the record of the inferior Court, may either affirm or reverse the judgment, as they draw the same or a different conclusion from that which has been pronounced by the Court below. These premises are, the pleadings between the parties; the proper continuances of the suit and process; the finding of a jury upon an issue in fact, if any such has been joined; and, lastly, the judgment of the inferior Court. All these premises, from which such judgment has been derived, the parties to the suit below have the right, *ex debito justitiæ*, to have upon the record.

But the orders or rules for amendments of proceedings made by a Court in the progress of a suit therein depending, do not fall within the description of any part of the record; but such orders are strictly and properly matters of practice in the progress of the cause, regulated by the power of amendment which the Courts of law possess, either by the common law or by the Statutes of Amendment which have been from time to time enacted by the Legislature for that purpose.

The practice of the Courts below is a matter which * belongs by law to the exclusive discretion of the Court * 236 itself; it being presumed that such practice will be controlled by a sound legal discretion. It is, therefore, left to their own government alone, without any appeal to, or revision by, a superior Court. And we cannot but observe, that no precedent has been cited at the bar in which an entry similar to that contended for by the plaintiff in error is to be found. So strictly has the law considered that the pleadings in the suit, and the judgment proceeding thereon, shall form the only grounds of the record, that when it was found expedient that the opinion, in point of law, of the Judge who tried the cause, should be made the subject of revision by a superior Court, the statute of Westminster the second (13 Ed. 1) expressly gave authority for that purpose by a bill of exceptions.

We, think, therefore, that it is not competent for the superior Court to examine into the propriety of the amendment, which is left to the sole discretion of the Court by which it has been made. And, if this be so, then the circumstances for the orders for the amendment being put upon

the record in this instance, cannot have the effect of giving competency to the superior Court to revise the propriety of such amendment. For if the grounds of the amendment are not in themselves removable by the writ of error, and if the parties to the suit have not, *ex debito justitiæ*, the right to put the rules and orders for the amendments upon record, then the superior Court would have, or would not have, authority to inquire into the propriety of the amendments, according as the inferior Courts did or did not return, in the particular instance, the order by which the amendment is made.

One of his Majesty's Judges has felt some doubt and difficulty in acceding to this opinion; but, upon the whole, acquiesces in its propriety.

* 237 * Such being the opinion of the Judges on the first question submitted to them by your Lordships, it becomes unnecessary for them to offer any upon the second.

LORD TENTERDEN. — My Lords, agreeing as I do with the opinion that has just been delivered, it is not necessary for me to trouble your Lordships at any length. It may be some satisfaction for your Lordships to know, that the Lord Chancellor is of the opinion you have just heard, and so is the noble and learned Lord, the Chief Baron, who has read the case, and so is the noble and learned Earl (ELDON), who was present when the case was first argued. If the House could entertain an inquiry into the propriety of amendments made in Courts of record, any other Court sitting as a Court of error might do so; yet this is the first instance in which any attempt has been made to place on the record, for the sake of the revision of a Court of error, any thing more than the pleadings and judgment of the Court below. If a Court of error could have the right to inquire into the propriety of any interlineations made in the judgment of a Court below, we should, before this time, have had some instances of that sort. But, as I have before observed, there are none. And if once the precedent is introduced of inquiring into the propriety of interlocutory matters, I am afraid that Courts of error will grant no writs of error that may not be made the means of delaying the interests of justice, and putting the parties to

needless expense. It is with great satisfaction that I have heard the opinions of his Majesty's Judges on this occasion, and that I now move your Lordships to affirm the judgment of the Court below. Another question might arise on the subject of costs, but as the Court of King's Bench has put the question on the record, I shall submit that this judgment be affirmed without costs.

Judgment affirmed accordingly.

* APPEAL

* 238

FROM THE COURT OF SESSION.

BAILLIE v. GRANT.

1882.

BAILLIE *Appellant.*
GRANT *Respondent.*

A. contracted a debt, and afterwards became a trader: the debt remained unpaid: he went out of trade, and then committed an act of bankruptcy. *Held*, that a commission of bankruptcy could be maintained upon such debt and act of bankruptcy.

Monday, June 25.

LORD CHIEF JUSTICE TINDAL. — The question proposed by your Lordships to his Majesty's Judges is this: A., not a trader, becomes indebted to B. to the amount of 100*l*. A. afterwards becomes a trader, and ceases to be a trader, never having paid his debt to B. After ceasing to be a trader he commits an act of bankruptcy: can B. support a commission against him upon his debt and that act of bankruptcy?

Upon this question, the Judges, who have heard the argument at your Lordships' bar, are of opinion, that a commission may be supported against A. upon the debt and act of bankruptcy above supposed. It has been decided, and has long

been considered as law, that a debt contracted before a man enters into trade, but continuing unpaid at and after the time he is in trade, is a sufficient debt to support a commission taken out against him upon an act of bankruptcy committed whilst he is a trader. See the case of *Butcher v. Easto*, Doug. 295. It has also been established beyond dispute, that a petitioning creditor's debt, contracted during the trading of the debtor, will support a commission taken out against him on an act of bankruptcy committed after the trading has ceased. This point has been settled to be the law by * 239 various decisions, commencing with that of * *Heylor v. Hall*, Palmer's Reports, 325, and ending with that of *Ex parte Bamford*, 15 Ves. 449. But it is contended, that although each of these propositions be true separately, yet that no inference can be drawn from them that the debt contracted *before* the trading, but subsisting during its continuance, and the act of bankruptcy committed *after* the trading, will support a commission. We think, however, that no valid or substantial distinction, in this respect, can be drawn between the debt contracted before, and that contracted during the trading. The debt contracted before trade, but remaining unpaid at and after the time the debtor enters into trade, appears to us to be a subsisting debt for every purpose, and subject to every consequence which belongs to a debt originally contracted during trade. It is the same with respect to the trader's ability to carry on his trade. The money lent to the person who afterwards commences trade may be, and often is, the capital upon which the trade itself is carried on. At all events, the credit given to the trader, by the forbearing to demand repayment, is one of the sources from which such capital is derived, and is the same in effect as a new loan. Again, the debt is attended in both cases with the same consequences as to the trader's ability to repay it, for in each the power of repayment is equally affected by the success or failure of the trader. No one would contend that a debt contracted during the period of trading, though not a trade debt, but contracted for private purposes, and applied to private occasions perfectly distinct from the trade, is to be considered as differing in any respect from a debt contracted

in the course of the trade itself. It seems, therefore, rather an artificial distinction, than a substantial difference, to hold that the debt contracted after the trading has commenced shall support the * commission taken out upon * 240 an act of bankruptcy, committed after the trading has ceased, but that the debt contracted before the trading, though continuing afterwards, shall not be attended with the same consequences. If a commission cannot be supported under these circumstances, a trader, by giving up his trade, which is a voluntary act on his part, would have the power of depriving his former creditors of the benefit of enforcing an equal distribution of his effects amongst all his creditors, and would be enabled to pay his subsequent creditors out of the very funds furnished or increased by those who were his creditors before he began trade. And upon referring to the Bankrupt Acts, there does not appear to be any distinction between these two classes of creditors as to the right to petition for a commission. The first statute which mentions a commission, is the 13 Eliz. c. 7, § 2, which states, in the most general terms, that "the Lord Chancellor for the time being, upon every complaint made in writing against such person or persons being bankrupt, as is before defined, shall have full power, by commission under the great seal, to name, assign, and appoint the persons therein described;" and all the subsequent statutes contain an enactment similar in effect to that in the 6 Geo. 4 (the present Bankrupt Act), that the Lord Chancellor shall have power, upon petition made to him in writing against any trader committing an act of bankruptcy "by any creditor or creditors of such trader," to issue his commission: words which comprehend equally all creditors for debts existing during the trading, whether contracted before or after the commencement of the trading. The principal stress of the argument at your Lordships' bar was placed, first, upon the precise language used by the Judges in the cases above referred to, wherein they * assigned the reason for their opinion, that the debt * 241 grew during the trading. But in those cases, the Judges speak with reference to the particular facts of the cases immediately before them, and such expressions afford

no necessary inference, that if the cases then under discussion had, like the present, been cases of a debt remaining and continuing during the trading, their conclusion drawn from the other facts would not have been precisely the same. Again, it has been argued, that the statutes only authorize the suing out a commission against a person "using" the trade of merchandise, by buying and selling, &c., and that the ground on which a commission is allowed to be sued out on an act of bankruptcy, committed by the debtor after he has ceased to trade, is, that he cannot be considered as having left off trade whilst any of the debts that he contracted during trade are still unpaid. But if the debts contracted before, but continuing after, are virtually and substantially the debts of the trader whilst a trader, as we think they are, the words of the statutes, which are allowed to extend to the one, ought, in reason, to be held to include the other also. Upon the whole, we think, that both upon the reasonableness of the thing, and also upon the proper construction of the Bankrupt Acts, a commission may well be supported under the circumstances supposed in the case submitted to us by this House.

THE LORD CHANCELLOR. — My Lords, the only point in this case is that which has been submitted to the Judges. It appeared to me that it should be argued before them, and that it was necessary the question should be decided by them, as it turned upon a principle equally applicable to English as to Scotch bankruptcies, and also because no previous decision could be found entirely in point. As the Judges have
 * 242 now given their * opinion, — an opinion with which I fully concur, — I shall move that the interlocutor be affirmed; but, in consideration that this is a case of the first impression, that it be affirmed without costs.

Interlocutor affirmed, without costs.

[198]

APPEAL

FROM THE COURT OF SESSION.

CLERK v. ADAM.

1832.

Sir GEORGE CLERK, of Pennycuik, Bart., and	} <i>Appellants.</i>
others	
Dr. WALTER ADAM, and the LORD PROVOST	} <i>Respondents.</i>
and MAGISTRATES of the City of Edinburgh	

While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely and adversely in another.¹

The terms in which a man puts a request are not to be considered as conditions binding on him and his issue to all time to use the subject-matter of that request in a certain manner and in no other.

THIS was an appeal from a decision of the Court of Session made under the following circumstances:—

Many years ago a number of gentlemen instituted a club, denominated the High School Club, the object of which was to perpetuate the recollections connected with that institution, where the members had received the early part of their education. They were generally persons of the first respectability, and displayed * much zeal for the hon- * 243
our of the establishment alluded to. One of the favourite objects of the club, at an early period, was to offer a mark of respect and gratitude to the talents and exertions of the late Dr. Adam, who had long held the office of Rector of the High School. With that view, at a meeting of the club in March, 1808, a resolution was adopted to request Dr. Adam to allow his portrait to be painted by the late Sir Henry Raeburn, the most eminent portrait-painter of Scotland at that time, in order, and for the special purpose, that the picture might be placed in the High School.

Accordingly, on March 21, 1808, the following letter of re-

¹ See Chitty Contr. (9th Eng. ed.) 351.

quest was addressed to Dr. Adam, by three members of the club:—

“DEAR SIR,— At a meeting of the High School Club some days ago, for the purpose of consulting how the members could best show you some mark of their regard, we are appointed a committee for carrying the resolutions into effect. In pursuance of these resolutions, we now beg leave to request, in the name of the club, that you will do us the favour to sit to Mr. Raeburn for your picture. We are anxious to place it in the school as a memorial of our gratitude— of the high sense we entertain of the advantages the public has derived for so many years from your useful and important labours. We flatter ourselves you will not be disposed to refuse this favour, when you reflect that we can ask it from no other motive but those of the most sincere regard and esteem; and that it may serve as an inducement to those who shall come after you, to emulate the able and conscientious discharge of your official duties, by * which you have contributed so much to extend the fame of our flourishing seminary.

“ (Signed) H. HOME DRUMMOND.
 ROBERT GRÆME.
 JAMES CAMPBELL.”

Dr. Adam assented to the request; his portrait was accordingly painted by the late Sir Henry, then Mr., Raeburn, and placed in a suitable frame; and on the 9th of August he wrote a letter to one of the club, part of which was in the following terms: “I feel my desire of prosecuting this work [his Dictionary] increased by the conspicuous manner in which you and your friends have been pleased to exhibit me to public view. I went yesterday to Mr. Raeburn’s, with a gentleman who was desirous to see the picture, and found it decorated with a very splendid frame, very different, indeed, from what it was in at the public exhibition. You have ordered every thing concerning it with so much propriety, and so far beyond my expectation, that whatever you determine with respect to the placing of it, and the inscription, will be

quite agreeable to me. I have only to request that the names of those gentlemen who have done me so great honour may be recorded; and that their reasons for doing so, which you so handsomely expressed in your first letter to me on the subject, may be shortly mentioned. The shorter and the more simple the inscription is made, the better."

But before any measure had been adopted for placing the portrait in the situation for which it was intended, Dr. Adam died. The members of the club afterwards applied to the magistrates of Edinburgh, by petition, for authority to place the painting in the * High School. Their peti- * 245
tion to the magistrates was thus expressed:—

"Unto the Right Honourable the Lord Provost and Magistrates of Edinburgh, the Petition of Sir George Clerk, Baronet (Pennycuik), John Brougham, and others therein named,

"Showeth, That your petitioners, in the year 1808, having requested the late Dr. Adam, rector of the High School of Edinburgh, to allow his portrait to be drawn at their expense, as a mark of their gratitude and respect for his meritorious discharge of his official duties, Mr. Raeburn, of this city, was accordingly employed for this purpose: that a personal application having been made to Donald Smith, Esquire, then lord provost of Edinburgh, for leave to place this portrait in the High School library, that gentleman was pleased to express himself favourable to their wishes.

"That the petitioners were not then fully prepared to avail themselves of the chief magistrate's permission; but that their portrait being now framed, with a suitable inscription, is ready to be placed in the library as soon as leave shall be obtained to that effect.

"May it therefore please your Lordship and Honors to grant leave, by a regular act of council, to the petitioners, to place the said portrait of Dr. Adam, acknowledging, in your deliverance hereon, that the property of the said portrait remains in the petitioners, and that they, or the majority of the survivors of them, may at any time hereafter dispose of

the same as they shall think fit; and that the said portrait shall not be at the disposal of the said magistrates of

* 246 Edinburgh * during the survivance of any of the petitioners; and that, failing them and all provision of theirs to the contrary, the magistrates shall then preserve the same *in perpetuam rei memoriam*. Signed in our name and by our appointment.

“H. HOME DRUMMOND.”

The magistrates did not cause the petition to be intimated to the present claimant, the son of Dr. Adam, and accordingly he was no party to the proceedings. An act of council was passed in the following terms:—

“Edinburgh, 25th April, 1810.—Read petition for Sir George Clerk, Baronet, &c.; which petition having been considered by the magistrates and council, they granted liberty to the petitioners to place the said portrait of Dr. Adam in the High School library, on the terms and conditions before mentioned.”

The portrait was shortly afterwards placed in the High School library. It remained there till a new and more elegant building was erected on the Calton Hill, as the High School of Edinburgh. Along with the teachers, and scholars, and library, the portrait of Dr. Adam was removed to the new apartments from the old premises.

On June 12, 1829, a letter was sent to the lord provost, referring him to the minute on the record of the town council's proceedings of the 25th April, 1810, for the conditions on which the picture was placed in the High School. This letter was written by Mr. R. Græme, one of the appellants, on behalf of the rest, and was sent for the purpose of obtaining an order from the town council for placing the picture at the disposal of the club.

Shortly afterwards, a petition was presented to the

* 247 * magistrates, by Mr. H. Home Drummond, setting forth, that, in the year 1810, a picture of the late Dr. Adam, rector of the High School, the property of the petitioner, and of certain other persons whose names are inscribed on the frame of the said picture, in consequence of

Dr. Adam's request, was placed in the High School library, with consent of the lord provost and magistrates, but under the express condition and reservation, that the said portrait should not be at the disposal of the said magistrates during the survivance of any of the said parties, all as more particularly set forth in a petition by them presented to the lord provost and magistrates in the year aforesaid ; which petition was considered by the said lord provost and magistrates, and liberty given by act of council of date April 25, 1810, to place the said portrait in the library on the terms and conditions mentioned in the said petition ; and praying, that as the High School library was now disused, the petitioner, and those for whom he applied, should resume possession of the picture.

The respondent, the son of the late Dr. Adam, having learnt what was going on, immediately instituted an inquiry into the nature of the original transaction between his father and the club ; and about the 16th or 17th of December, 1829, discovered the letter of 21st March, 1808.

The lord provost, on January 9, 1830, wrote upon the subject to Mr. Græme, and afterwards a meeting of the members of the club was held, when the following resolution passed : —

“ Edinburgh, 18th January, 1830. — At a meeting. this day of the proprietors of Dr. Adam's picture, the lord provost's note of the 9th January to Mr. Græme was laid before them.

* “ Mr. Græme was requested to return thanks to * 248 the lord provost for his polite communication, and to express the regret of the proprietors that they cannot comply with the wishes of the committee of council, by allowing the picture to be put up in the Hall of the New High School, until it should descend to the survivor of the subscribers.

“ Mr. Græme was farther requested, on the part of the proprietors of the picture, to renew his application to the lord provost, to give the necessary instructions for sending the picture, as soon as convenient, to Mr. Colvin Smith's house, York-place, Edinburgh.”

In reply to this resolution, and an accompanying letter of

the same import, the respondent, Dr. Walter Adam, wrote a letter to the lord provost, in which, among other things, he observed, that his claim could not be affected by the act of the town council of the 25th April, 1810, as his father was then dead, and his representatives had not been consulted on the occasion, for if they had, he felt assured they would never have consented to any such conditions as were at that time obtained by the gentlemen of the club.

Further communications took place on both sides, and to put an end to the dispute, the magistrates and town council of the city of Edinburgh raised the present action of multiplepoinding.

The present claimant demanded and insisted that his father's portrait should, in the terms of its original destination, remain in the High School of Edinburgh under the protection of the magistrates and council of the city, who are patrons of the seminary.

The Lord Ordinary (COREHOUSE), on 2d March, 1831, pronounced an interlocutor in favour of the appellants, finding that the picture was their property, and that the
* 249 * intention expressed by them of placing it in the library of the High School was not a condition stipulated.

Against this interlocutor, Dr. Adam appealed to the First Division of the Court of Session. The Judges of that Court, with the exception of Lord GILLIES, pronounced the following judgment: "They adhere to the interlocutor reclaimed against, in so far as it finds that the picture in question is the property of the claimants, the members of the High School Club: but, *quoad ultra*, they alter the said interlocutor, and find that it was an implied condition in the treaty betwixt the club and the late Dr. Alexander Adam, when he sat for his picture to the late Mr. Henry Raeburn, that the portrait was to be placed in the High School of Edinburgh, as a memorial of the high sense the claimants entertained of the advantages the public derived from his useful and important labours, and as an inducement to those who might come after him to emulate the able and conscientious discharge of his official duties, by which he had contributed so much to extend the fame of the High School; and they accordingly decern and declare, that

the said picture shall remain in the High School of Edinburgh *in perpetuum rei memoriam*, and that the magistrates and council of the city of Edinburgh, as the patrons of that seminary, shall be answerable that it is properly placed therein, agreeably to the object in view, and carefully protected from all injury: Find no expenses due by either of the parties."

The appellants now appealed against that part of the decree which ordered the picture to remain for ever in the High School of Edinburgh.

The Lord Advocate and *Mr. Serjeant Spankie* were heard on the part of the appellants, and *Dr. Lushington* on the part of the respondents. — It was contended * for * 250 the latter, that *Dr. Walter Adam*, being the natural as well as legal representative of his father, was entitled not only to enforce all contracts made with his father, but to take care that whatever would contribute to the fame or honour of his father was duly preserved; that *Dr. Alexander Adam* had only sat for his picture upon condition of its being placed in the High School of Edinburgh; and that to preserve and perpetuate his fame, as well as to be an incitement to exertion among his successors, it was right that the picture should be placed there, and that such had been the original intention of the parties, who were not released from their contract by the mere circumstance of the change of the room in which the High School was held. For the appellants it was insisted, that no such contract had been entered into; and, on the contrary, that *Dr. Alexander Adam* had, by the letter of the 10th of August, left the whole matter entirely at the discretion of the members of the club; that the property in the picture was in them; and that property, without the right of possession, and without the means of enjoyment (for they could only enter the High School by favour) was a thing unknown to the law: and further, that admitting the right of a son, as representative of his father, to be such as it was claimed, there was no ground whatever made out for the exercise of that right in the present instance, as there was not the slightest pretence for saying that the appellants

wished to dispose of the picture in any manner derogatory to the fame of Dr. Alexander Adam, for whose memory they still entertained the highest respect.

Judgment. Monday, July 16.

The Lord Chancellor, after stating the circumstances under which the case came before the House, said that he
 * 251 entirely agreed with the interlocutor of the * Lord Ordinary, and of course, therefore, dissented from the judgment of the Court of Session, who, though they had admitted the question of property, had held that Dr. Alexander Adam had sat for his picture upon a certain condition, and decreed the performance of it. Now, what kind of property in a personal chattel could a man be said to have, if, at the same time, it was affirmed, with respect to the same chattel, that there was in other persons a right inconsistent with any one incident of property? So new and extraordinary a species of right required the strongest proof to support its existence. What was the proof here? The respondents say that Dr. Alexander Adam sat for his picture on an implied condition that it was to be used only in a certain way. It is not said that that condition vested a joint property in the picture in him and his family with the members of the club at whose request it was taken; but the judgment, referring to the point of property, says that it is in the appellants alone. The letter of the 21st March, the sitting in consequence of that letter, and the letter of the 9th August, were all of them evidence on the point of property in favour of the claimants. It was impossible to say that the terms in which a man put a request, were to be considered as conditions that were to bind him and his issue to all time to use the thing which was the subject of that request in a certain manner, and in no other. These were merely matters of courtesy and feeling, with which the law could not interfere. The letter of the 9th of August was important to be considered. The representatives of Dr. Adam could not stand in a better situation than he himself did. That letter gave the doctor no such right as that which was now claimed by the respondent, Dr. Walter Adam. The right of prop-

erty in these * gentlemen was admitted. Of what * 252 use was that right when totally severed from the means of the enjoyment of that property? These gentlemen, in consequence of the picture, which was their property, being in the school-room, could not possess any right whatever over the school, which belonged to the magistrates alone, and could not even go in to see their own picture except as a matter of grace and favour. The doctrine put forward by the Court of Session could not be supported. The interlocutor of the Lord Ordinary must therefore remain, and the judgment of the Court of Session be partly reversed. He had no doubt that this picture would be dealt with most properly by the appellants, and the property would be as safe in their hands from any neglect whatever, as it would in the hands of any other persons. He believed, too, that the costs of these proceedings would not be borne by Dr. Walter Adam.

Judgment of the Court of Session reversed as to that part which directed that the picture should for ever remain in the High School of Edinburgh.

FROM THE COURT OF CHANCERY IN IRELAND.

DUFFY v. ORR.

1832.

CORNELIUS DUFFY *Appellant.*ROBERT ORR and Others : . *Respondents. (a)*

A., a creditor of a firm, held securities from one of its members for moneys advanced by him, at different times to the firm, but claimed a balance beyond what those securities would cover. All the creditors of the firm agreed to accept a composition "of 7s. for every 20s. due to the said creditors respectively." A. was the first to sign this deed; but added to his signature the words, "without prejudice to any securities whatever that I hold." The other creditors signed, in their respective order, under A.'s signature. *Held*, that such a composition, thus accepted, did not affect the rights of A. upon his previous securities, but only related to the balance beyond the sum they would cover, and that he might afterwards enforce those securities in equity.¹

A COMMERCIAL partnership, consisting of John Duffy, senior, Cornelius Duffy, the appellant, and John Duffy, junior, was formed, in the year 1812, for the purpose of carrying on the

(a) This case was decided in the Session 1831, but was accidentally omitted. [S. C., 5 Bligh N. S. 620.]

¹ For cases showing the extent to which Courts have held sureties liable, where the creditor has compounded with the principal debtor, or given time to him, or done other acts, under a reservation of remedies, which, without such reservation, would have discharged the sureties, see *Owen v. Homan*, 4 H. L. Cas. 997; S. C., 3 Mac. & G. 378, 406; *Kearley v. Cole*, 16 M. & W. 128, 135; *Davidson v. M'Gregor*, 8 M. & W. 755, 768; *Cowper v. Smith*, 4 M. & W. 519; *Bailey v. Edwards*, 4 B. & S. 761 (Am. ed.) 775 note; *Green v. Wynn*, L. R. 4 Ch. Ap. 204; S. C., 17 W. R. 72; L. R. 7 Eq. 28; 38 L. J. Ch. 76; 19 L. T. N. S., 553; *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 13 W. R. 922; 12 L. T. N. S. 49; 34 L. J. Exch. 133; *Webb v. Hewitt*, 3 K. & J. 438; *Solly v. Forbes*, 2 B. & B. 38; *Clagett v. Salmon*, 5 Gill & J. 314; *Sohier v. Loring*, 6 Cush. 537; *Hutchins v. Nichols*, 10 Cush. 299; *Peay v. Bos-*

business of calico printers, at Ball's Bridge, near the city of Dublin, and at Bridge Street, in that city.

Soon after its formation, the firm became embarrassed, and the respondent, Robert Orr, being connected by marriage with the members of it, and being possessed of considerable property, was applied to, in * the years 1812, * 254 1813, and 1814, by the partners in the firm, but particularly by the appellant, who exclusively managed the money concerns of the firm, for pecuniary assistance. He assisted the firm with advances of money and credits, up to the year 1814, to the amount of upwards of 30,000*l.* About the middle of that year, the embarrassments of the firm increased, and Orr, having declined to advance to them further sums, without security, it was proposed by Cornelius Duffy, that Orr should accept, as some security for his then advances, and for the further advances which he was solicited by the appellant to make, a mortgage of a part of the property of the firm, called the Ball's Bridge concerns, for the sum of 10,000*l.*; a mortgage of another property, called the Bridge Street concerns, for a sum of 5000*l.*; and a mortgage of an estate in the county of Galway, belonging to the appellant, for the sum of 10,000*l.* The respondent, Orr, agreed to comply with those proposals; and, accordingly, by three indentures, two bearing date the 2d of August, 1814, and the third bearing date the 28th of September, 1814, the Ball's Bridge concerns and the Bridge Street concerns were mortgaged to him.

The Galway estate was afterwards mortgaged to him, on

ton, 10 Yerger, 111; *Bangs v. Strong*, 10 Paige, 11; *Prout v. The Branch Bank*, 7 Ala. 309; *Viele v. Hoag*, 24 Vt. 46; *Fletcher v. Jackson*, 28 Vt. 598, note; *Gustine v. Union Bank of Louisiana*, 10 Rob. (La.) 412; *Harbert v. Dumont*, 3 Porter (Ind.), 246; *Dickinson v. The Board of Commissioners of Ripley Co.*, 6 Porter (Ind.), 128, 133, 134; *Wyke v. Rogers*, 1 De G., M. & G. 408; *Ex parte Harvey*, 4 De G., M. & G. 881; *Thomas v. Courtney*, 1 B. & Ald. 1; *Nichols v. Norris*, 3 B. & Ad. 41; 3 Lead. Cas. in Eq. (3d Am. ed.) 537 [825] notes to *Rees v. Berrington*. A necessary consequence of a reservation of a creditor's remedies against a surety is a continuance of the surety's right to be indemnified by the principal debtor; and this will not be abandoned unless a contract to abandon it be proved. *Close v. Close*, 4 De G., M. & G. 176.

the 5th of November in that year, for 10,000*l.*; and, as a further security, a bond with warrant of attorney, in the penalty of 20,000*l.*, was executed by Cornelius Duffy, conditioned for the payment of 10,000*l.* in February, 1816. After the date of this mortgage, Orr advanced further sums to the firm, which, however, became more embarrassed, and in the beginning of 1816 proposed a composition of 15*s.* in the pound, which was accepted by the creditors, and a composition deed was accordingly executed in June of that year. In

* 255 the beginning of 1817, a docket was *struck against them. In that year, John Duffy the elder died insolvent. Up to the 31st of July, 1817, there was a balance due to Orr of 7830*l.* over and above the three sums secured by mortgage. On the 14th of August in that year, Cornelius Duffy wrote to John Duffy, junior, his partner, a letter, containing these words: "The Galway property certainly has nothing to do with the creditors; that part only concerns him and I" [me].

In August and September, 1817, various meetings of the creditors of the firm were convened, at which the accounts were investigated, and Orr was pressed by the creditors, and by appellant and John Duffy, to accept a conveyance of the equity of redemption of the mortgaged properties in Dublin, in full satisfaction of the sums for which they were respectively mortgaged, leaving him a creditor upon the general funds of the firm for 7830*l.*; and it was further proposed, by Cornelius, and John Duffy, junior, that Orr and the other creditors should accept a composition of 7*s.* in the pound; Orr receiving such composition on the said sum of 7830*l.*, the balance due after deducting the sums for which he had agreed to accept satisfaction and security as aforesaid. The creditors, however, before they acceded to a composition, insisted on appellants retiring from the firm; and it was proposed and agreed that appellant, upon retiring, should be released from all demands in respect of the debts then due. These proposals being agreed to, the arrangement was carried into execution, by an indenture, bearing date the 18th September, 1817, made between Cornelius Duffy of the first part, the creditors of the firm of Duffy and Sons of the second part, and John Duffy the younger of the third part, reciting the compo-

sition concluded in 1816, and that Cornelius * Duffy * 256 and John Duffy, as surviving partners of the firm, were, from sundry misfortunes in trade lately sustained by them, unable to discharge the said composition, and reciting that the creditors, parties thereto, after due examination into the affairs of the partnership, had agreed to accept a composition from them of 7s. in the pound, to be secured by the promissory notes of the said John Duffy alone, in full satisfaction and discharge of their several debts; which composition was to be divided into five equal shares, payable in six, nine, twelve, fifteen, and eighteen months. And that it was further agreed between Cornelius and John Duffy, that the said co-partnership should be forthwith dissolved; and that the stock, debts, &c., should be vested in and made over to John Duffy, to enable him to pay the composition notes, so to be executed by him as aforesaid. The indenture witnessed that the several persons who had subscribed it, being creditors of the original firm of John Duffy and Sons, or of Cornelius and John Duffy, so continuing to trade under the said firm as aforesaid, thereby covenanted to accept the sum of 7s. so secured as aforesaid, in full discharge and satisfaction of the debts due from the original firm of John Duffy and Sons, or from the said Cornelius and John Duffy, so continuing to trade under the said firm as aforesaid, or for which they were in any manner responsible. And Cornelius Duffy was absolutely released from any debt due on account of the firm of Duffy and Sons, or that of Cornelius and John Duffy.

This deed was executed by the respondent, Robert Orr, as one of the creditors of the firm of Duffy and Sons, but expressly without prejudice to any securities whatever that he held.

Promissory notes were accordingly given by John Duffy, junior, to the several creditors, for the amount * of * 257 the composition on their respective debts, and were indorsed by the respondent, Robert Orr; and it was on the faith of his credit alone that the creditors accepted such compromise.

In further pursuance of the said arrangement, by two several indentures respectively bearing date the 6th November,

1817, the equity of redemption in the said premises at Ball's Bridge, and in the said premises at Bridge Street, was conveyed to the respondent, Robert Orr, in discharge of the said sums of 10,000*l.* and 5000*l.* respectively, making together the sum of 15,000*l.*, part of his demand against the said firm.

Appellant for several years acquiesced in the deeds, and conformed thereto and acted thereon; but in August, 1822, declined to pay Orr any further interest. Orr, therefore, in 1824, filed a bill in the High Court of Chancery, in Ireland, against appellant and others, for a foreclosure of the mortgage on the Galway estate; and also prayed the appointment of a receiver, and an inquiry into prior incumbrances, and the execution of the trusts of the deed of the 6th November, 1817.

Defendants appeared and answered, and witnesses were examined; but before hearing of the cause, in 1826, the appellant filed a bill in the Court of Chancery in Ireland against respondent, Orr, John Duffy, and others, alleging that the Ball's Bridge and the Bridge Street concerns were much more valuable than the respondent, Orr, admitted; that no accounts had been settled, so as to ascertain the amount due; and that appellant had been compelled to act under the fear of a threat of bankruptcy. The cross-bill insisted that the mortgages on the separate property of the appellant ought to be considered as auxiliary only in case of the deficiency of the joint property, and that Orr ought to be deemed to

* 258 have accepted the sum of * 7*s.* in the pound as a composition upon his whole debt. It prayed that Orr might be compelled to elect between the joint property of the firm and the separate property of Cornelius Duffy; but if he should insist on a right to resort to the separate property, as well as to the joint property, for payment of his demands on the firm, that the several deeds of the 6th of November, 1817, might be declared void, and the premises called the Ball's Bridge concern, and the Bridge Street concern, might, as well as the Galway estate, be declared to be still in mortgage to the respondent, Robert Orr, to secure the balance due to him from the firm; but that the joint property might be declared to be the fund principally liable to the payment thereof; and

that the separate property of the appellant might be resorted to only in the event of the joint property of the appellant proving insufficient to pay the balance; and that the balance might be ascertained, and that various accounts therein particularly mentioned might be taken, and that upon payment of the sum ascertained to be due, the respondent, Robert Orr, might be decreed to reconvey the mortgaged property.

The defendants to this bill appeared and answered, and witnesses were examined on both sides.

The evidence offered by the appellant in support of his bill consisted, in great part, of the testimony of different individuals on the subject of the money expended in the buildings and machinery in the Ball's Bridge concern, and of the estimated value of that property for sale in the year 1817, some of the witnesses examined on the part of the appellant representing that in their opinion it was then worth, to be sold, 20,000*l.* or 25,000*l.*, while the witnesses examined on the part of the defendants estimated it as then worth not more than 7000*l.* or 8000*l.*

* Both causes came on to be heard on the 22d day of * 259 June, 1829, before Sir ANTHONY HART, Lord Chancellor of Ireland, and on the 25th of June, 1829, his Lordship pronounced a decree in the cause of *Orr v. Duffy and others*, that it be referred to the Master, to take an account of what was due to Orr, for principal and interest, on the foot of the deed of mortgage of the Galway property, having reference to the indenture of agreement of the 6th day of November, 1817. And it was further ordered, that all persons having debts, charges, and incumbrances affecting the mortgaged lands and premises in the said indentures mentioned, prior to the said indenture of the 5th day of November, 1814, should be at liberty to go in before the Master to prove and ascertain their demands; and that a receiver should be appointed to receive the rents and profits of the mortgaged lands and premises in the said indentures mentioned.

On the same day his Lordship pronounced a decree in the second cause, *Duffy v. Orr and others*, whereby he directed the bill filed by the appellant to be dismissed with costs.

From these decrees Cornelius Duffy appealed, praying that the same might be reversed.

The respondent, Robert Orr, contended that the said decrees should be affirmed, and the said appeal dismissed with costs.

Sir Edward Sugden and *Mr. Lynch* were heard on behalf of the appellants. — After going through the circumstances stated in the case, they argued that the appellant stood merely in the relation of a surety to Robert Orr; that the composition which the latter had agreed to accept was a composition in respect of his whole demand; and that all the partnership property ought first to be brought into use before the
 * 260 private * property of the appellant was resorted to.

The deed of 1817 ought only to stand for what was justly due, and the account of what was due ought to be taken on all the property of which Robert Orr was possessed, and consequently on all the partnership property, which ought to be first employed, and the private property of the appellant ought only then to stand as a security for the balance. All the mortgages had the common object of securing to Robert Orr the fluctuating balance. Now the composition deed subsequently entered into was a discharge of the principal debtor; and the principal being discharged, the surety was also released. That was the rule adopted in the case of *Ex parte Glendinning*, Buck's Cases in Bankruptcy, 517, where the Court held, that if a creditor executed a deed of compromise with the principal debtor, the surety was discharged, unless the remedies against him were specially reserved. In the judgment of that case it was said, "Ever since Mr. Richard Burke's case, the law has been clearly settled, and it is now perfectly understood, that unless the creditor reserves his remedies, he discharges the surety by compounding with the principal, and the reservation must be upon the face of the instrument by which the parties make the compromise." The securities still claimed by Robert Orr, after having entered into the composition deed, could not be enforced, for otherwise that deed would be a fraud upon the other creditors. In the case of *Ex parte Sadler*, 15

Vesey, 52, it was held, that upon a composition, a private agreement by some creditors for an additional security, though for no greater sum, is void. The Lord Chancellor there said: "I was not aware of the last decision in the Court of King's Bench, that where the security is for the same sum which is secured by the general composition, * it is a fraud upon the creditors; but I am much * 261 struck with it, and I think there is much principle in it. If it is competent for six out of seven creditors to obtain sureties, even for the same amount, the seventh is imposed upon; as, instead of having the evidence of the other six that the act which he is about to do is reasonable, proved by the same act on their part, he is circumvented by their obtaining, as against him, from their debtor, an advantage which they will not give him as against themselves. They mislead the creditor into a situation in which their own acts show they think it unreasonable that he should be placed."

Mr. Pepys and *Mr. Swanston*, for the respondents. — The appellant had no right on which he could claim to be heard against the validity of these transactions in a Court of justice, for he had assigned all right and interest in the business, and in every thing connected with it, to J. Duffy. In consideration of his doing so, the creditors had consented to take 7s. in the pound, and J. Duffy had alone become answerable for the payment of that composition. It was clear that the composition was not fraudulent as against the creditors, for Mr. Orr had been the first creditor to sign the agreement for a composition, and the composition deed itself; and to his name he had affixed the declaration, that his signature of that deed was not to affect the other securities that he then held. That declaration was in itself a special reservation, on the face of the instrument, according to the authority of the case cited, and was a notice to the other creditors, who, by signing the deed after him, admitted his right to that additional advantage.

Decree affirmed, and appeal dismissed with costs.

* WRIT OF ERROR.

FROM THE EXCHEQUER CHAMBER.

GLAMORGANSHIRE CANAL CO. *v.* BLAKEMORE.

1832.

THE COMPANY of PROPRIETORS of the }
GLAMORGANSHIRE CANAL NAVIGATION } *Plaintiffs in Error.*
RICHARD BLAKEMORE *Defendant in Error.*

Where a canal Act gave to the proprietors of the navigation a power of making a canal, and of using the waters of a river for supplying it, but provided, at the same time, for securing to the owners of certain works the use of the surplus waters of that river, the making of the canal ascertained and fixed the rights of the parties, and the canal proprietors had no right afterwards to enlarge the canal, and draw a much larger quantity of water from the river, so as injuriously to affect the works in question.¹ A declaration charging it to have been the duty of the canal proprietors to abstain from thus enlarging their canal, and alleging a breach of that duty, sets forth a sufficient cause of action against them.

A clause in a second Act of Parliament relating to the same canal declared that the works thereby authorized should be completed within two years from the time of its passing, and that the money to be raised by it should not be applied to defray the expenses of any of the works not made within that time. *Held*, that this clause not only limited the application of the money to works completed within that time, but that no works should be carried on, adversely to the interest of individuals, after the expiration of the two years. A declaration framed on such a clause, and alleging for breach that works were so adversely carried on after the expiration of the two years, was held to contain a sufficient legal statement of a cause of action.

MR. BLAKEMORE, in Hilary term, 1827, brought an
* 263 action on the case, against the Glamorganshire * Canal Company, for an illegal abstraction of water from certain works belonging to him, and known by the names of the Melin Griffith Works, and the Pentyrch Works. The

¹ The case of *Goodrich v. Longley*, 1 Gray, 615; 4 Gray, 379, was decided on the same principle.

declaration contained thirty-eight counts, divided into two sets of nineteen counts each. The first set related to the Melin Griffith, and the second to the Pentyrch Works. In the first six counts of the first set, the plaintiff complained of the company for not properly erecting a weir, as directed by the Act of Parliament, 30 Geo. 3, c. 82, under the authority of which they had made their canal; for afterwards making another weir not directed by the Act of Parliament, which caused the water that would otherwise have been conveyed to the plaintiff's works by means of the parliamentary weir, to run off from the said works; for leaving open the stopgates and floodgates, and for not properly puddling and lining the canal. The question now in dispute chiefly arose upon the sufficiency of the counts from the 7th to the 14th, both inclusive.

The seventh count stated, that before the passing of the said Act, and until the taking and carrying away of the water by the defendants, large quantities of the water of the river Taff ran and flowed through the cut or watercourse in the said Act mentioned, to the Melin Griffith Works. And whereas by a certain other Act of Parliament, passed in the 36th year of King George the Third, "to amend an Act of the 30th year of his Majesty, for making and maintaining a navigable canal from Merthyr Tidvil, to and through a place called the Bank, near the town of Cardiff, in the county of Glamorgan, and for extending the said canal to a place called the Lower Layer, below the said town," it was enacted that the several works therein mentioned, and all other works whatsoever incident to the said canal, *and extension to be made by virtue of these Acts, * 264 should in all things be finished and completed within the space of two years next after the passing of the last-mentioned Act. * By reason of which premises it became the duty of the defendants not only to make and continue such weir, as was directed by the said Act, for the use of the Melin Griffith Works, but also, after the expiration of the said two years, to abstain from enlarging, widening, deepening, varying, or altering the canal, or the works thereof, or by such ways and means lessening the quantity of surplus

water, or such as should not be necessary for the use of the said canal, and in all respects to allow and give to the proprietors of the said works the reasonable and just benefit, use, and enjoyment of the said weir so directed to be made as aforesaid; and although the defendants did make a certain weir, for the purpose of letting off the surplus water, or such as should not be necessary for the use of the said canal, into the said cut or watercourse for the benefit of the works, yet they did not, after the expiration of the said two years, abstain from enlarging, widening, deepening, varying, and altering the said canal, but, on the contrary, had greatly enlarged, widened, deepened, varied, and altered the canal, whereby a much greater quantity of water became necessary for the use of the said canal, and whereby large quantities of water being in the said canal, which otherwise would have been surplus water, or not necessary for the use of the said canal, and which ought to have been, and otherwise would have been, let off and conveyed by and over the said last-mentioned weir out of the canal into the said cut or watercourse of the said plaintiff, for the benefit of the said works,

became necessary for the use of the said canal so wrong-
 * 265 fully * enlarged, widened, deepened, varied, and altered as aforesaid, and ceased to be surplus water, and were prevented from running and flowing by and over the said weir in this count mentioned, unto the works of the plaintiff, and ran and flowed away from the works, whereby the said plaintiff lost great part of the use of the said weir so directed to be made as aforesaid, and large quantities of the water of the said canal, of which he ought to have had the use. The eighth count was for continuing the grievances mentioned in the seventh. The ninth count was for continuing an enlargement of the sea lock, made more than two years after 36th G. 3, whereby more water was required for the use of the canal. The tenth count recited that before the passing of the Acts 30 Geo. 3, c. 82, and 36 Geo. 3, c. 69, the waters of the Taff flowed through the plaintiff's cut or watercourse to his works, and that by the authority of these Acts the defendants were required to finish the said canal, and all the works and extension of the same, within two years after the passing

of the last of these Acts, and alleged that it thereupon became their duty to abstain from afterwards making any engine to carry off the surplus waters of the Taff from the plaintiff's works, yet the said defendants, not regarding their duty, after the expiration of the said two years from the passing of the last-mentioned Act, made or erected a certain steam-engine, for the purpose of pumping and conveying the water of the said river into the canal, whereby large quantities of the water of the said river, which otherwise would and ought to have run and flowed through the said cut or watercourse to the said works, were pumped by the engine out of the river into the canal, and flowed away from the works. The eleventh count was for continuing the injuries mentioned in the tenth count. The twelfth count recited * matters similar to those in the tenth count, alleged that it was the duty of the defendants to make a weir to carry off the surplus waters into the plaintiff's watercourse, and complained that although they did make the weir, yet they did not abstain from enlarging, widening, deepening, varying, and altering the said canal, but, on the contrary thereof, had greatly enlarged, widened, deepened, varied, and altered the said canal, whereby a much greater quantity of water became necessary for its use, and the surplus water was diminished. The thirteenth count was for continuing the grievances mentioned in the twelfth count. The fourteenth count stated the grievance to be the keeping and maintaining an enlargement of the sea lock, which had been wrongfully made after the making of the weir directed by the first Act. The fifteenth count stated that the defendants improperly used the water of the canal for the purpose of working a corn-mill. The sixteenth count stated that the defendants improperly used the water for the working of steam-engines. The seventeenth count stated that the defendants improperly used the water for a graving-dock. The eighteenth count stated that the defendants improperly used the water for the purpose of making iron: and the nineteenth count stated the plaintiff's possession of Melin Griffith Works, and that the defendants wrongfully diverted the water which ought to flow to them, without stating the Acts of Parliament or the mode of diversion.

Each of the counts stated general and special damage to the plaintiff, as proprietor of the Melin Griffith Works.

The other counts, from the twentieth to the thirty-eighth inclusively, complained of injuries to the Pentyrch Works, of the same description as those stated in the corresponding * 267 ing * counts of the first set, with respect to the Melin Griffith Works.

The defendants pleaded the general issue and the Statute of Limitations.

The cause was tried before Mr. Justice LITLEDALE, at the Hereford summer assizes, 1827.

The jury found a verdict for the defendants on the 15th, 16th, and 18th, and on the 34th, 35th, and 37th counts, being the corresponding counts of the two sets; and a verdict for the plaintiff, on both issues, on all the other counts of the declaration, for 172*l.* damages; the damages were entire. The plaintiff afterwards had judgment on that verdict.

This judgment the company carried by writ of error into the Exchequer Chamber, where, in Hilary term, 1830, the judgment was affirmed: on which they brought their writ of error in Parliament, and prayed the reversal of the judgment on the following grounds: The counts, from the 7th to the 11th inclusively, were bad, inasmuch as they assumed that by the 36 Geo. 3, c. 69, § 3, (a) the powers of the company were taken away after two years. That Act only restricted the application of the funds thereby raised to works finished within that time. The powers of the company were given in the first Act by express words, and could only be taken away by express words. The 12th, 13th, and 14th * 268 counts were * bad, as they assumed that the company, after making the canal under the first Act, and the weir directed by that Act, were bound to abstain from making

(a) Enacting, "that the said works, and the said extension, and all other works whatsoever incident to the canal and extension, to be made by virtue of the said recited Act, and this Act, shall in all things be finished and completed within two years next after the passing of this Act, and no part of the sum to be raised as aforesaid shall be applied in or towards defraying the expenses of performing any of the works aforesaid which shall not be made or done within the space of two years."

any alteration that might cause it to require more water, and stated no cause of action except a violation of that supposed duty. The defendant in error insisted that the judgments of the Courts below ought to be affirmed, because by the two Acts a contract had been established between the company and the proprietor of the Melin Griffith and Pentyre Works, by which, upon the completion of the canal, he acquired a vested right and interest in the surplus water of the canal, and the waters of the Taff, in such manner, and to such extent, as the canal, with its engines and machinery then made and existing, afforded to his works. That such had been the construction put upon the two Acts by several learned Judges, both at law and in equity. That if the company had a right to diminish the supply of water, by the deepening or widening of the canal, or by the erection of new engines, they had a right to take it away entirely, a right which the legislature never could have intended to give them. That the counts objected to were, therefore, not bad in law, and it was properly assumed in those counts that the company were prohibited, by the contract contained in the two Acts, from exercising the powers given them after the expiration of two years from the passing of the last of those Acts. And that those counts stated a sufficient cause of action in showing that contract to have been broken by the company.

Mr. Maule, for the plaintiffs in error. — The ground of appeal was, that some of the counts on which the plaintiff below had judgment were bad in law. Where a joint judgment was given on different counts in a declaration, if one of the counts was *bad, the judgment could not * 269 be sustained. That proposition was too clear to be disputed. All the counts in this declaration, from the 6th to the 14th, were bad. One objection applied equally to all of them, and a second objection applied to the 12th, 13th, and 14th counts alone. The general scope of the declaration was, that the company had used the canal in such a manner as to prejudice Mr. Blakemore in the occupation of certain works. The first Act on the subject of this canal was 80

Geo. 3, by some of the sections of which the company were allowed to take water from watercourses, and by others they were directed to erect a certain weir: then followed the 36 Geo. 3, c. 39, by which the company were empowered to raise sums of money to defray the expense of works therein directed to be done. The 10th count charged no other grievance than this, that at the expiration of two years after the passing of the 36 Geo. 3, the canal company had pumped into the canal, by means of a steam-engine, a certain quantity of water. It was intended to state on the face of that count, that it was not competent for the company to make a steam-engine after the expiration of the two years. That question, if it could be raised at all, must depend on the construction of the 3d section of the 36 Geo. 3. The 12th, 13th, and 14th counts made no mention whatever of the Act. They alleged that it became the duty of the company to make a weir, and also, after the making and erection of the said weir, to abstain from enlarging the canal, so as to lessen the quantity of surplus water that flowed from it into the watercourse, and they alleged a breach of this supposed duty. The result of this was, that Mr. Blakemore must contend, that after the canal had been once made, there was an end of the powers of the company. Such a construction of the

* 270 * Act was clearly wrong. The two Acts were said to establish a contract between the parties. There was no such contract. An action had lately been tried on these very Acts, in which the defendant defended himself from a claim of tolls made on him by the company, on the ground that the company had contracted and agreed with him to charge him no more than the lowest amount of toll. That case was tried before Mr. Justice PATTESON, who held that the Acts established no such contract. In like manner it was impossible to contend that there was any contract in them that the works on the canal should be finally completed within the space of two years, and that no others should ever afterwards be begun. No man of sense could ever pretend to say that a canal could be made complete in the first instance. The Act of the 36 Geo. 3 was passed avowedly for the purpose of enlarging the powers of the canal company;

yet it was contended, on the part of the defendant in error, that this very Act had for its object the limitation of the rights of the canal company. Powers, when once given, could not be taken away, except by express words used for that purpose. In the case of *The King v. The Glamorganshire Canal Company*, 12 East, 157, the Court expressly declared, on the construction of these two statutes, that "the company might erect new works, in furtherance of the purposes of the old line of navigation, for though the works might be new *in specie*, yet being for the maintenance of the old canal and works, the company were authorized to make them." It might be said that that was a case between a freighter and the canal company, and that the freighter there stood in a different situation from the present defendant in error. Admitting that observation to be true, still the opinion of the Court, as to the construction of the Acts, was the same, and must * be taken materially to affect * 271 the present case. After that came the case of *The King v. The Justices of Glamorganshire*, 7 Barn. and Cres. 722. That was the case of an application by the present defendant in error to compel the justices to disallow certain expenses which had been incurred on the canal, upon the ground that the powers of the canal company had expired. It was there contended that the 36 Geo. 3 did not intend to authorize the company to make new works, but Lord TENTERDEN said, that as far as the question then before the Court went, that Act was wholly immaterial, and he afterwards declared that in his judgment the widening and deepening of the canal was an expense necessarily attendant on the using of the canal, and was for the public benefit. Mr. Justice LITTLEDALE, too, when the question had come before him on the construction of this Act of Parliament, had treated the two years' clause as a limitation relating only to the application of the 10,000*l*.

LORD LYNDHURST.—Suppose the company complete the canal, and it remains in that state for twenty years, and Mr. Blakemore has the use of the surplus water during that time. You say you have a right to alter and improve it; but may

you do it so as to injure him in the possession of that right, which he has enjoyed for twenty years? You having declared the canal complete, can you, at the end of twenty years, say that, under the term improvement, you can deprive him of the water, the use of which he has enjoyed during that time.

Mr. Maule. — The words of the Act, giving the company power to make improvements, were not restricted by any express words following them; and without such words of restriction, the company could not be prevented from
 * 272 making improvements at any * length of time after they had first declared the canal completed.

Mr. Serjeant Ludlow and *Mr. Serjeant Russell*, for the defendant in error. — There was no doubt that if part of the declaration in this case was bad, the present judgment could not be sustained. The question was, whether the counts from the 7th to the 14th inclusive did not state a sufficient cause of action. The 12th, 13th, and 14th counts stood on the first Act of Parliament, and all of them complained of an enlargement of the canal, or the making a sea-lock. These counts simply amounted to this, that plaintiff being possessed of a certain watercourse, and of a right to water to supply the same, the company injured him in the possession of that right. Another question involved in that was, how far the company were restrained from making such improvements, after the expiration of a limited period? It was not meant to be contended, that after the canal had once been declared to be completed, they were absolutely restrained from making any alterations whatever; but it was submitted that they were restrained from making such alterations as would injure the plaintiff's works; and the powers given them under one or both of the Acts must be construed with reference to *Mr. Blakemore's* rights. The two Acts formed a contract on the part of the company, and were subjected to this rule of construction, that they must be taken as strictly as against a public company. That rule was acted on in the case of *Scales v. Pickering*, 4 Bing. 448. That was a question arising on an Act of Parliament for sup-

plying a part of the neighbourhood of London with water. By sect. 32 of that Act, a water company was empowered to break up the soil and pavement of roads, highways, footways, * commons, streets, lanes, alleys, passages, * 273 and public places, provided (§ 84) that they should not enter any private lands without the consent of the owner. It was held that the company had no authority, without the consent of the plaintiff, to enter a field of his, over which there was a public footpath. When the case came before the Court, on motion to set aside the verdict for the plaintiff, Chief Justice BEST said, "They who enter in such cases must clearly show their authority, and if the words of the statute on which they rely be ambiguous, every presumption is to be made against the company, and in favour of private property." And Mr. J. PARK afterwards observed, "It is a wise rule, in the construction of private Acts of Parliament, that they should be construed strictly." The effect of the construction contended for on the other side was in direct contradiction to that of these two learned Judges. The question now was, whether Mr. Blakemore, having obtained at a certain time a right to the use of a quantity of water, that right could be taken away afterwards at the pleasure of the company. The case of *Duncombe v. Sir E. Randall*, Hetley's Reports, 34, was an authority on this point. The fact of the case, and the opinion of the Court, were thus stated: "In an action upon the case between Duncombe and Sir E. Randall, for diversion and stopping of a river, it was agreed by the Court, that if one had anciently ponds, which are replenished out of a river, he cannot change the channels, if any prejudice accrue to another by that, and yet the effect by perfluxions is to have the ponds fed out of the river. But 'sic utere tuo ut ne laedas alieno.'" That case was commented on and approved of in *Brown v. Best*, 1 Wilson, 174. The case of *Bealey v. Shaw*, 6 East, 208, determined that * 274 owner of land through which a river runs cannot, by enlarging a channel of certain dimensions, through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other land-owner lower down the river, who had at any time before such

enlargement appropriated to himself the surplus water that did not escape by the former channel. The question, therefore, would be, what was surplus water, and whether it would shift and vary, according to the pleasure of the Glamorgan-shire canal company, or by any other means. In all the counts objected to, the breach of duty complained of was a breach of duty not resting on an absolute restriction upon the company not to take any more water than they had taken at first, but on a restriction against taking water which, under the circumstances, would and ought to have flowed to Mr. Blakemore's works. It was the common case of the obstruction of a watercourse by one of two parties, each of whom was entitled to take the water to a certain extent.

[LORD LYNTHURST. — In the 10th count the complaint is, that the company have altered the canal, and the matter of the count is stated as if they had no right to alter the canal at all after the expiration of the two years.]

The 10th count stated both the Acts of Parliament, and would be good upon either of them.

[LORD LYNTHURST. — That is on the supposition, that after making the canal, there was an immediate prohibition against the company making any alteration.]

The canal being once finished, the surplus water vested in the owner of the works, and no right could afterwards accrue to the canal company to diminish his supply at their pleasure.

Mr. Maule, in reply. — It had been said that the
 * 275 * company might do what was necessary, provided they did not injure any body by doing it. But that extent of privilege was secured to them, as it was to every body else, without requiring an Act of Parliament to be passed for the purpose. These Acts enable the company to do more, and decreed a mode of compensation for those who were injured. Unless they had been passed for the purpose of

extending the common-law privilege admitted on the other side, they need not have been passed at all.

The case stood over till the 30th of August, when judgment was moved for and delivered.

Judgment.

LORD LYNDEHURST. — My Lords, there was a case argued, not a long time since, in which I have to move your Lordships for judgment. It was an action upon the case brought by Mr. Blakemore, to recover compensation in damages for injuries which he alleged he had sustained in consequence of certain works that had been carried on by the proprietors of the Glamorganshire canal navigation, the effect of which had been to diminish the usual supply of water to two mills of which he was and is the occupier. The declaration consisted of a great number of counts, one-half of which applied to certain works known by the name of the Melin Griffith Works; the other half applied to works called the Pentyrch Works. The counts, with respect to the Melin Griffith Works, are substantially the same as those that relate to the Pentyrch Works. It is not necessary, therefore, that I should trouble your Lordships by going over all of them, as the same objections apply to both. The jury found a verdict in favour of Mr. Blakemore, on many of the counts, and in pursuance of that verdict, judgment was entered up in the Court of Exchequer upon those counts, both as * they related to the * 276 Melin Griffith Works and to the Pentyrch Works. A writ of error was brought from that judgment into the Court of Exchequer Chamber, and after argument there, the judgment was affirmed. From that judgment a writ of error was brought here, and it is for your Lordships now to say, whether the judgment of the Court of Exchequer Chamber, preceded by the judgment of the Court of Exchequer, was, or was not, erroneous. The verdict and the judgment were general, and it follows, therefore, that if any one count is defective, of course the judgment cannot be sustained.¹ The objections

¹ See per SEDGWICK, J. in *Benson v. Swift*, 2 Mass. 53; *Kingsley v. Bill*, 9 Mass. 198; *Sullivan v. Halker*, 15 Mass. 374; *Blanchard v. Fisk*,

that are made on the part of the defendants are made to some of the counts, and if those objections are valid, if any one of them indeed is valid, the judgment ought to be reversed. In order to simplify the case, we must class the counts, and the objections to them. There is one set of objections which apply to the first seven counts; there is another set which apply to the counts from the 7th to and including the 11th; there is another set which apply to the 12th, to the 13th, and to the 14th; and similar objections apply to the corresponding counts that relate to the Penttyrch Works. I shall begin by considering the objections as far as they apply to the 12th count, and after I have stated the observations I have to make regarding that count, it will be unnecessary for me to trouble your Lordships with any thing as to the 13th and 14th counts, for the principle which is applicable to the 12th count will equally apply to them. I shall afterwards direct the attention of your Lordships to the 7th count, and then again it will be unnecessary for me to go into the 8th, 9th, 10th, and 11th; for the principle that applies to the 7th will equally apply to them. In order to understand the 12th count, which

* 277 refers to a certain * Act of Parliament, I must state the facts as they appear in that count, and in the Act, for that is the true way in which to present the case to your Lordships' consideration. It appears that previously to the passing of an Act of Parliament, as far back as the year 1790, the parties under whom Mr. Blakemore holds the Melin Griffith Works were in possession of the same works in the same state; and it is alleged in the declaration, and must be taken now after the verdict to have been proved, that at that time they were entitled to the benefit of the water from the river Taff, which passes through a certain cut or watercourse from the Taff, for the use of those works. The works, in fact, were carried on by the water from the Taff, communicating with them through a certain cut or watercourse. They were entitled to that water at that time. At that period an Act of Parliament was passed establishing a company, the object of which was to form a navigable canal from Merthyr-Tydvil

2 N. H. 398; O'Connell v. The Queen, 11 Cl. & Fin. 238; Barnard v. Whiting, 7 Mass. 358; Nye v. Otis, 8 Mass. 122; Barnes v. Hurd, 11 Mass. 59.

to a place called the Bank, near Cardiff. The canal so formed was to be supplied with water from the river Taff, and from other sources in the neighbourhood. It is quite obvious, therefore, that the water so drawn from the river Taff, considering the situation of the canal, would be water drawn from that source which supplied the works of Melin Griffith. When the Act of Parliament, therefore, was passed, a provision was made for securing and protecting the interests of the owners of those works. It was provided in the Act of Parliament, that there should be a weir in the canal on that side of the canal communicating with the cut or watercourse to which I have referred, and that care should be taken that the locks and the gates immediately below the weir should be kept in good repair; a very effectual provision for that purpose was put into the Act. The effect of this arrangement * was this, that the water passing into the Taff would, * 278 with the exception of that which was necessary for the purposes of the canal, pass over the weir into the watercourse as before, and be made use of for the Melin Griffith Works. This was an arrangement made under the authority of the legislature, and probably with the consent of the parties,—certainly with the authority of the legislature. After this Act of Parliament was passed, the canal was completed, and the weir constructed. The Act did not point out any particular dimensions for the canal; it seems to have been considered that the parties at the time understood what species of canal, and what size and what form of canal, was intended to be made. The canal, as the declaration states, was actually formed according to the provisions of that Act, and by the forming of that canal, an apportionment of the water was made under the authority of the legislature. It was competent for the company of proprietors at the time to have made a larger canal, as there are no limits in the Act of Parliament to which the canal was to be confined. They made that canal under the authority of the Act, an Act containing a provision for the purpose of securing the benefit of the waters of the Taff to the owners of the Melin Griffith Works; and under it they apportioned the water as between themselves, the proprietors of the canal, and the owners of those works. I con-

ceive that having done so, the rights of the parties were fixed and ascertained. The legislature gave the company of proprietors a power to do this ; a power to make the canal, and to construct the watercourse in the manner I have described.

The question is, whether, after these works have been so made and so completed under the authority of the Act

* 279 of Parliament, after the water for the Melin * Griffith

Works had been provided for as I have stated, after the apportionment of the water had been made, as it was made in pursuance of the provision in the Act of Parliament, the rights of the parties were not fixed, ascertained, and determined from that moment? My Lords, I am of opinion that they were, and I think your Lordships will be of that opinion also, and that the company of proprietors of the Glamorganshire Canal Navigation had no right afterwards to enlarge and extend, and widen and deepen their canal, so as to draw a much larger quantity of water from the river Taff, and thus to interfere with the water which had been so apportioned to the Melin Griffith Works, and so as injuriously to affect their use. The declaration goes on to allege, after stating the facts I have mentioned in the 7th count, that after the weir had been constructed, and after the canal had been completed, it was the duty of the company of proprietors of the canal to abstain from enlarging, widening, deepening, varying, and altering the canal, and that it was their duty to allow the proprietors of the Melin Griffith Works the fair and reasonable use of the weir that had been made as I have stated ; but that, not regarding their duty in that respect, they had, at a subsequent period, varied, enlarged, widened, and deepened the canal, and drawn off thereby very large quantities of water, and had, in a great measure, thereby deprived the plaintiff of the full benefit of the water which had been secured to him under the authority of the Act of Parliament. I conceive that such a case proved, is a just case for entitling Mr. Blakemore to damages against the company of proprietors, and if your Lordships are also of that opinion, then as far as relates to the 12th count, your Lordships will be pleased to affirm the judgment of the court below.

* 280 * I have already stated that the 13th and 14th

counts depend upon the same principle. It is unnecessary, therefore, that I should trouble your Lordships with any observations on those counts, or on the corresponding counts relating to the works known by the name of the Penttyrch Works; the question there is, and the counts are precisely, the same. As to the 7th count, that is in substance the same as the 12th count, which I have stated: but, in addition to what I have stated, it contains a most important fact, rendering the case stronger, if possible, than it is upon the 12th count. It states that in the year 1796, six years after the passing of the Act to which I have referred, another Act of Parliament was passed, relating to the same subject. That Act declared, that the money which had been raised under the former Act of Parliament was not sufficient to enable the company of proprietors of the Canal Navigation to complete all the works, and that it was desirable the limits of the canal should be extended to a point beyond the original point, and it gave authority to raise the additional sum of 10,000*l.*, and a further sum of another 10,000*l.* under other circumstances, for the purpose of completing the works authorized under the original Act, and for the purpose of making the extension which I have adverted to. But then that Act of Parliament ordained, by way of proviso, that all those works began under the former Act, or under this Act, should be completed in two years, and that no part of the money should be applied to any of those works that should not be completed within the two years. Now it is said that the meaning of that Act is merely this, not to prohibit the carrying on of the works after the expiration of the two years, but that if any of the works remain, at the expiration of the two years, unfinished, the further works shall not be paid for out * of the * 281 10,000*l.* which was to be so raised. I am not of that opinion: I think the Act of Parliament means to say, that no part of the 10,000*l.* shall be applied to any works that should not be completed, and that were not finished, within the two years; and further, that it means to say, that no works should be carried on adversely to the interests of any individual after the expiration of those two years. Six years had already been occupied at the passing of this Act in the

carrying on of these works, and it was its object to fix a time to which the parties adverse to the interests of the proprietors should be able to confine them in the prosecution of their further works. That is the reasonable and safe construction of the Act of Parliament, and is the clear and intelligible meaning of it. The 7th count alleges that the canal was completed at the expiration of the two years, and it states that it was the duty of the company of proprietors of the Canal Navigation, after the expiration of the two years, to abstain from making any enlargement to the canal which should interfere with the interests of Mr. Blakemore, and that notwithstanding that, after the expiration of the two years, they enlarged, widened and deepened the canal, and thereby took great additional quantities of water from the Melin Griffith Works to the great injury of Mr. Blakemore: and the question is, whether that 7th count contains a sufficient legal statement of the cause of action. I think your Lordships will entertain no doubt that that count to which I have just referred states even a stronger case than the 12th count, and that it does contain a sufficient legal statement of the cause of action. The rights, as I have before stated, of Mr. Blakemore were fixed, in the first instance, by the previous Act of Parliament. The second Act gives a

* 282 certain further time to the company * of proprietors of the canal to carry on and alter, and make their works: it must, therefore, reasonably be said that it was intended that within the two years any alteration that was to be made should be made by the company of proprietors, and that no body could say that any alteration was to be made after the expiration of the two years. Taking into consideration the language of the clause, and the construction of the Act, which I have considered to apply to it, can we conceive, in justice and propriety, that after the expiration of the two years, the canal could be enlarged by the company of proprietors, in a manner injurious to Mr. Blakemore? I think not. I should recommend to your Lordships, therefore, upon this 7th count, to affirm the judgment of the Court below. The judgment then upon the 8th, 9th, 10th, and 11th counts will also be affirmed; and the judgment on the corresponding counts,

applying to the Penttyrch Works, will likewise be affirmed. The consequence on the whole will be, that I shall move your Lordships that in this case the judgment of the Court below be affirmed.

Judgment affirmed accordingly.

* WRIT OF ERROR

* 283

FROM THE COURT OF EXCHEQUER CHAMBER.

COLVIN AND OTHERS v. NEWBERRY AND BENSON.

1832.

DAVID COLVIN and Others *Plaintiffs in Error.*NICHOLAS NEWBERRY & T. S. BENSON *Defendants in Error.*

Where the owner of a ship appointed G. B. to the command, and agreed that he should proceed to Calcutta and return to London, and that he might make intermediate voyages, paying a certain sum in consideration thereof; and the owner further agreed to supply the ship with stores, in consideration of which G. B. agreed to take the command, and receive the ship into his service, for twelve months certain, or for such time as would be necessary to complete the voyage, paying at a certain rate per ton per month for the ship. *Held*, that although G. B. was further bound by the agreement to remit the freight bills to London as security, and that such bills were to be vested in trustees who were to receive the freight, and hand over the surplus to him, and although the owner was to have an agent on board, who was to have the sole management of the stores, and to have power to displace G. B. for breach of any covenant in the charter-party, and appoint another commander, G. B. was the owner of the vessel during the continuance of the charter-party, and was as such alone liable to persons who, knowing its provisions, had shipped goods on board the vessel for the homeward voyage.¹

¹ See Abbott Shipp. (11 Eng. ed.) 37 *et seq.*, 248-252; (8th Am. ed.) 41, 42 [35]; note, 66, 67 [57], note and cases cited; 1 Parsons Mar. L. 234-236; 3 Kent, 137, 138; Swanton v. Reed, 35 Maine, 176; Nash v.

THIS was a writ of error upon a judgment of the Court of Exchequer Chamber, reversing a judgment of the Court of King's Bench given in favour of the plaintiffs.

The first count of the declaration stated, that the
 * 284 * defendants below, on the 11th day of March, 1817, were owners of a certain ship or vessel called "The Benson," whereof one George Betham then was master, and which said vessel was then riding at anchor in the river Hooghly, in the East Indies, and bound on a voyage from thence to the port of London; that the defendants, so being owners of the said vessel, the said plaintiffs, on the day and year aforesaid, shipped and loaded, and caused to be shipped and loaded, on board of the said vessel, divers goods and merchandises, to wit, &c., of them the plaintiffs, to be taken care of and safely carried and conveyed on board of the said ship or vessel, from the river Hooghly aforesaid to the port of London, and there to be safely delivered, in good order and well-conditioned, to certain persons commonly called and known by the names and using the style and firm of Messrs. Bazett, Farquhar, Crawford, and Company, or to their assigns, for certain freight and reward payable by bills in that behalf, and although the said goods and merchandises were then and there had and received by the said George Betham, so being master of the said ship or vessel as aforesaid, in and on board of the said ship or vessel in the river Hooghly aforesaid, to be carried, conveyed, and delivered as aforesaid, yet the said defendants, so being owners of the said ship or vessel as aforesaid, not regarding their duty as such owners, but neglecting the same, and contriving, &c., did not nor would safely or securely deliver the same, or cause the same to be delivered, to the said Messrs. Bazett, Farquhar, Crawford, and Company, or to their assigns; but, on the contrary thereof, the said defendants, so being owners, &c., so improperly behaved and conducted themselves, that a great part of the said

Parker, 38 Maine, 489; Baker v. Huckins, 5 Gray, 596; Urann v. Fletcher, 1 Gray, 125; Tuckerman v. Brown, 17 Barb. 191; Marquand v. Banner, 6 El. & Bl. 322; 25 L. J. N. S. Q. B. 313; Campion v. Colvin, 3 Bing. N. C. 17; Belcher v. Capper, 4 M. & Gr. 502; Sandeman v. Scurr, L. R. 2 Q. B. 86.

goods, &c., was wholly lost to * the said plaintiffs, and * 285 the residue damaged. The defendants pleaded the general issue, — not guilty.

The cause was tried at the London sittings after Hilary term, 1820, before Lord Chief Justice ABBOTT, and it being admitted that the case depended upon the question whether the defendants were liable to the plaintiffs as carriers of the goods, and the Chief Justice stating it as his opinion, upon the facts then disclosed, that as there was a charter-party, of which the plaintiffs had notice, there was no contract between the parties, nor any thing upon which a duty could arise, the plaintiffs submitted to be nonsuited. A rule was afterwards obtained to set aside the nonsuit, when it was agreed to put the question into the form of a case, which being argued in Trinity term, 1821, the Court ordered a new trial to be had, that the *bona fides* of the transaction might be inquired into, and that the question of law might be put upon the record. The cause was again tried at the sittings after Michaelmas term, 1826, before Lord TENTERDEN and a special jury, and a special verdict was found on the first count of the declaration only, the jury being discharged from giving a verdict on the other counts.

The special verdict found, that on the 11th day of March, 1817, the said plaintiffs shipped on board the said ship "Benson," near Calcutta, in the East Indies, then riding at anchor in the river Hooghly, two thousand one hundred and seventy-one bags of sugar, and one hundred and ninety-one chests of indigo; that a bill of lading thereof was signed by George Betham, then being the master of the said ship under the circumstances thereafter mentioned, and that the said George Betham received the said goods on board the said ship, to be carried and conveyed according to the said bill of lading; that before and at that time the * de- * 286 fendants were owners of the ship, and that before she sailed to the East Indies, and whilst they were such owners, the charter-party for the said ship of the 7th June, 1816, also set forth by them, was executed by the defendant Benson, then managing owner acting on behalf of himself and the other part owners of the one part, and the said George

Betham of the other part; and that the said charter-party was made and executed *bona fide*. The verdict further found and set forth a memorandum, signed and agreed to on the 25th day of July, 1816, by Benson and George Betham; and that one Samuel Oviatt went as agent on board the ship under the charter-party, and carried out letters of introduction from Buckles, Bagster, and Buchanan, merchants in London on behalf of the said defendants, to the plaintiffs, by which he was directed to apply to them in case of necessity, and he did apply to them, and they acted as agents at Calcutta, both for the defendants and George Betham, as thereafter mentioned; that the said Samuel Oviatt acted under a power of attorney, executed by Benson, and which was set forth in the verdict; that Oviatt carried out with him the said charter-party, and communicated it to the plaintiffs as soon as he arrived at Calcutta, and before the shipping of the said goods, and the plaintiff read the charter-party, and received a copy thereof, and that for the freight of the sugar and indigo, in the bill of lading mentioned, the plaintiffs drew bills upon certain other persons payable sixty days after the ship's arrival in London, to the order of the firm of Buckles, Bagster, and Buchanan, which bills they delivered to Oviatt, to be remitted to them pursuant to the stipulations in the charter-party, and the bills were so remitted; that the said George Betham employed the said plaintiffs as his * 287 agents at Calcutta, who acted as such, and * collected and paid over to him the freight of the goods carried in the ship on the voyage from London to Calcutta, and procured freight for him on the voyage from Calcutta to London, and they had a commission from him for so doing: that the said ship sailed from the river Hooghly to London with the sugar and indigo on board, but that they never were delivered to the said plaintiffs or their assigns pursuant to the said bill of lading, but that part was lost and the rest damaged.

The special verdict came on for argument before the Court of King's Bench in Easter term, 1828, and the Court gave judgment for the plaintiffs.

A writ of error was thereupon brought by the defendants to the Court of Exchequer Chamber, when that Court

unanimously reversed the judgment of the Court of King's Bench.

Mr. Serjeant Taddy, for the plaintiffs in error.—The judgment of the Court of Exchequer Chamber ought to be reversed. What was the general law on subjects of this nature? The principle relied on by the defendants was, that there was no privity of contract between the plaintiffs and them. The answer to that was, that the law merchant raised a privity of contract by force of the relationship between them. Wherever there was an agreement to carry goods, there must be a consideration for doing so; and whoever was the owner of the vessel was necessarily entitled to freight. It was asked, on the other side, whether it would be possible for the defendants in error to maintain an action for freight, and it was said that if the plaintiffs could maintain an action against them for the loss of the goods, they must be able to maintain an action against the plaintiffs for the freight of carrying those goods. That proposition, however did not necessarily follow the other. The rule on both points * was thus stated by Roccus, in his * 288 work, "*De Navibus et Naulo*," n. 27: "*Contrahentes cum magistro navis habent electionem agendi, vel contra magistrum vel contra dominum navis in solidum, et solutione unius liberatur alter,*" and "*Dominus autem navis nullam habet actionem contra illos qui cum magistro contraxerunt, sed contra magistrum per ipsum electum.*" This was a proper rule, because persons who were in a foreign port, wishing to ship goods to this country, were often necessarily ignorant as to who were the owners of the ship; but if they came to know afterwards, it was right that they should have the privilege of following up the ownership wherever it should be found to be vested. The owner's remedy was against the master whom he had selected; that was a clear rule. There were many cases in which the duties of a party and his rights were not equivalent. Where a person held himself out as a partner in any trading company, he became liable to all the world as a partner, but he was not equally able to maintain an action against those to whom he thus

became liable; for to do that, he must prove that he was in reality a partner. That was the case of *Kell v. Nainby* (10 Barn. & Cres. 20). The law raised a consideration from the situation of the master of the vessel on one side, and that of the owner on the other. There was no difference between the law of England and the general common law of Europe in that respect. *Boson v. Sandford* (3 Levinz. 258, and 2 Salk. 439) had established, that the owners of a vessel were liable on the contract of the master, on two grounds; first, the receipt of the freight; and secondly, the possession of the vessel. It was necessary to be divested of the right of ownership in order to be divested of responsibility. In like

manner, they were liable if they had a command over
 * 289 the * freight; so that to save themselves from responsibility, they must show two things: that they had been divested of the possession, so as to cease to be considered owners, and that they had no connection with the freight. The case of *Boucher v. Lawson* (Cas. Temp. Hardw. 85 and 194) was a strong authority on this point. There the master did not account to the owners for the freight; and yet it was held that if he refused to deliver the goods to the consignee, an action for non-delivery would lie against the owners on the general custom.

The charter-party in this case was peculiar. Freight bills were in the first instance delivered to the owners' agents: that showed that they were to receive the freight; so that it was impossible to contend, upon that ground, that there was no privity of contract between the plaintiffs and defendants. It was true that the freight was, in the first instance, to be put into the hands of trustees; but then it was to be applied by them for the benefit of the defendants. How then could they deny their interest in it, or their liability on account of that interest? The Courts of King's Bench and Exchequer Chamber had differed in opinion on this case. In the Court of Exchequer Chamber it was supposed that the charter-party was a mere security, out of which the owners might or might not receive payment of the freight. The words of the judgment were (7 Bing. 210; 1 Tyrr. 83; 1 Crom. and Jerv. 218): "As to the third objection, the charter-party gives the owners

a security upon freight bills received by the freighter, but gives them no direct nor immediate interest in the freight earned." It was true that the owners had a special security for the freight, but that made no difference in the case; for at the same time they had a general interest in the freight earned, and that was sufficient to constitute a liability on their part. The * public had nothing to do with * 290 the mode in which the owners and the captain settled their accounts; if the owner received a benefit from the freight, he was in the ordinary condition of owner. A shipper of goods in a foreign port was not to be obliged to exercise his judgment on the particular terms of a charter-party between the master and the owner. The possession of the ship was the next ground of liability of the owner. It was to be lamented that in the law of England there was a difference in the rule relating to this part of the subject from the law of other countries. The general rule of marine law declared that he that was the owner was liable for the acts of the master; but here the Courts departed from that general rule, and introduced confusion into the subject, from their wish to apply the rules to particular cases. It was usual here for the owner of a chartered vessel to be the master, and in that way he was liable in a double character, as master and charterer. It was clear that in this case the freighter and the master were the same person. That was found on the face of the special verdict, where an express contract for wages was stated, "wages 10*l.*, say 10*l.* per month, no primage or privilege of tonnage whatever." It was said, that he might also be the owner; and it was then asked what the effect of that would be? Why, this: he would bind himself by the bill of lading, and the shipper would lose one of his two securities. The defendants here claimed the benefit of ownership; for 100 tons of goods were to be carried for their benefit. Betham undertook to navigate the ship on these conditions, and take it into his service. It was said that he was the owner of the ship, because he had taken it into his service; but there was nothing here equivalent to the demise of the ship: and even if there had been, still the owner might * not * 291 have parted with all his privileges, nor released himself

from all his liabilities. The case of *Christie v. Lewis* (2 Brod. & Bing. 410) showed that an owner, who had not parted with the whole possession of the vessel, retained his lien for freight, though the words "granted and to freight let and accepted, and to freight taken," were inserted in the charter-party. In cases, however, where there was an actual demise, it was held, that the owners still retained their lien for the freight. The cases on this subject were all collected in Abbott on Shipping, book i. chap. i., where those of *Parish v. Crawford* and *James v. Jones*, the latter of which was in some measure at variance with the former, were both considered. It might be admitted, that where the charter-party was so executed as to divest the owner of all proprietorship for the time so as to leave him no agent on board to control the captain or to receive the freight, the result with respect to his liability would be changed. In *Mackenzie v. Rowe* (2 Camp. 482) such a case occurred; and in *James v. Jones* the owner did not receive freight at all. The first general rule of the common law made the owner liable on the signing of the bill of lading, and the second declared that he only ceased to be liable if he was divested of the ownership, or of his interest in the receipt of the freight.

Mr. Campbell and *Mr. V. Richards*, for the defendants in error. — As to the facts of this case, notice was taken that the plaintiffs were informed of the nature of the contract. The master and crew were appointed by the absolute owners, who thus remained in possession as between the master and themselves. An action for running down might therefore have been brought in the name of the absolute owners, but that did not make them liable to the shipper of goods, * 292 for * they did not receive the freight. The master paid them for the hire of the ship, and he was entitled to the freight. That was the case of *Christie v. Lewis*. This was, in fact, an action on the contract, and it made no real difference whether it was laid in the form of tort or of assumpsit. Both were actions on the case. One arose on a promise, the other on a duty; but the duty itself only arose upon a contract. The action was not framed on the custom of the

realm. In the case of *Marzetti v. Williams*, 1. Barn. & Adol. 415, the Court of King's Bench held that where a contract was the foundation of an action, it made no difference, as to the rights and liabilities of the parties, whether the declaration was framed in tort or in assumpsit. The plaintiffs here were consequently in the same situation as if they had declared, that in consideration of receiving freight, the defendants had undertaken to carry the goods. That being an action of contract, the question would have been, who were the contracting parties. On that question, the plaintiffs must have been out of court. The Court of King's Bench had recognized the general principle, that where there was a charter-party, the freighter was *pro hac vice* owner, but they took a distinction between a common charter-party and the present. It was, however, broadly stated on the other side, that the owner was not divested of his liability unless he parted with his interest in the ship. But a charter-party in the common form was one where the absolute owner gave up his ship to another person for the use of that other. That relieved him from responsibility as against all persons who knew of the contract. The plaintiffs here knew of it; they contracted with the freighter, and not with the absolute owner. His situation would be the same whether the ship was in ballast, or whether she had a * full cargo. It was the same as with a lease and * 293 sub-lease. The lessee might sublet, but the absolute landlord had no benefit, and suffered no loss from that; and it was the same with the shipper of goods and the absolute owner. If freight was payable, the freighter alone was liable, for it was he who made the promises, and he ought to be responsible if they were broken. It made no difference that Betham was both the freighter and the master. The general rule was, that where there was a charter-party, the freighter was the carrier of the goods. The case of *Boucher v. Lawson* did not aid the argument on the other side, for, in the first place, the declaration there was defective in not properly stating the custom of the realm, but merely alleging the duty of the defendant; and in the next, it was the common case of a ship sold for the account of the absolute owners, the master receiving freight instead of wages. There were two

cases that expressly determined, that where there was a charter-party, the absolute owners were exempt. They were the cases of *James v. Jones*, and *Mackenzie v. Rowe* (Abbott on Shipping, 20 & 21, 5 edit.). *Parish v. Crawford* was by these cases declared not to be law. The liberty reserved to the owners to ship one hundred tons of goods for their own benefit was a strong circumstance to show that Betham was the owner *pro hac vice*, for without that reservation they would not have been entitled to ship a single bale of goods. The profit or loss of the voyage was to be borne by Betham alone, and the owners only had a lien as against the freighter to recover the freight. It was true that the word "demise" was not in this charter-party, but Lord Chief Justice TINDAL had said, in the judgment in the Exchequer Chamber, that "even in a lease of lands no such words were absolutely necessary." Whatever showed the intention of

* 294 * a party to give to another the use of the profits would amount to a demise. In this case Betham was described as the freighter of the said ship, and then came the reservation, that it was to be in the service of Betham till it returned to London. In the case of *Vallejo v. Wheeler*, it was held that a deviation committed by the master, with the knowledge of the absolute owner, was an act of barratry with respect to a third person who had hired the ship by a charter-party, and was therefore considered the owner for the particular voyage. There was an agreement for payment to the owners for the hire of the ship of a fixed and certain recompense, which was not to be affected by the loss of the ship. The freight bills were for that reason only to be considered as securities. If the freight bills fell short of the sum due for the hire of the ship, the freighter was to make up the difference; if they exceeded it, he was to be entitled to the surplus. The circumstance of Oviatt going with the ship made no alteration in the character of Betham as freighter, for the charter-party could not be put an end to by Oviatt; he could only displace Betham as captain, if Betham acted improperly in that character. His removal would not exonerate him from paying for the hire of the vessel, nor the party who contracted with him from paying him the freight. The

case which had been put relating to partnerships, was a case where there had been concealment of the facts, for if the facts were known to both parties, there must be a reciprocity of action. There was nothing, even in the declaration itself, to distinguish this case from that of a common charter-party, for in the declaration it was alleged, that the plaintiffs caused goods "to be loaded on board the ship for a certain freight, payable by bills in that behalf." That was the foundation of the supposed * duty. For that duty there * 295 must be a consideration, and the consideration on the general demurrer would appear to be these freight bills, which, instead of being payable to the owners, would, at the trial, be proved to be payable to Betham, on whom alone the duty attached, and who alone was responsible for the breach of it.

Mr. Serjeant Taddy, in reply. — *Dewell v. Moxon* (1 Taunt. 391) showed that the defendants here could maintain an action against the shippers for the freight, but even if they could not, still they would be liable. Charter-parties were not always in the same form, but at all times it would appear that, as between the shippers of goods and the owners, the latter were held liable, as being in possession of the ship. *Seville v. Campion*, 2 B. & A. 503. It was said that Oviatt's duty was only applicable to the rights which Betham derived as captain, but what the plaintiffs laid stress on was his being there at all, and receiving the freight bills on behalf of the owners. These bills were more than a mere security; but even if they were not, that alone would be sufficient to make the owners liable. If they could be connected with the receipt of freight, or the possession of the vessel, the question was entire, and they were responsible to the shipper of goods. The pleadings were immaterial if the facts were as they were in favour of the plaintiffs.

Lord TENTERDEN, who sat as deputy Speaker, said that the question depended on the construction of the charter-party, and he should wish for time to frame questions to be put before the Judges for their opinion.

The case stood over until the 11th of July, when judgment was moved as follows : —

* 296 * LORD TENTERDEN. — My Lords, there is a case of Colvin and others against Newberry and another, very lately argued before your Lordships, and in the absence of my noble and learned friend, who has just left the House, it falls to my lot to supply his place on the woolsack. The case was argued before several of the Judges, and I have had an opportunity of collecting from them their opinions, and it did not appear to me to be necessary to put to them any formal question, they being all of opinion that the judgment from which the writ of error is brought to this House, namely, the judgment of the Court of Exchequer Chamber, should be affirmed. The Judges of that Court reversed the judgment which had been given in the Court of King's Bench. At the time it was given, I was present in the situation which I now have the honour to fill, and among the Judges who were present at the argument in this House was one of the learned Judges — I mean my learned brother, Baron BAYLEY — who was a Judge of the Court of King's Bench at the time this case was decided there, and he, upon reflection, has changed his opinion, and is one of the Judges upon whose unanimous opinion I shall take the liberty to move your Lordships to affirm the judgment of the Court of Exchequer Chamber. Some other of the learned Judges, who were present on that occasion, had not been members of either of the Courts at the time the case was argued. The matter, therefore, to them was new. Having stated shortly to your Lordships the manner in which the case proceeded, I shall, with your Lordships' permission, direct your attention to the point in dispute, what the case really was, and upon what grounds the judgment of the Court below should be affirmed. My Lords, it was the case of an action brought by the present

* 297 * plaintiffs in error, against the defendants, as the owners of a ship called the "Benson." The action was upon a bill of lading of goods shipped on board that ship at Calcutta, for which a person of the name of Betham, who was

then master of that ship, had signed the bill of lading for the right delivery of the goods in London ; but the goods were not delivered. Two propositions of law are clear, as applicable to a case like this : the first is, that in the common case of goods shipped on board a vessel belonging to a person, of which the shipment is acknowledged by a bill of lading signed by the master, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship ; the other, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested chartered that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions, and every thing else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore*, during the voyage for which the ship is chartered. It cannot be maintained against the person who has let out the ship on charter, namely, the absolute owner. Those two propositions being clear, the question is, whether the instrument, to which I am about to direct your Lordship's attention, is to be considered as a charter of the ship to Betham, who went out as master, or whether the true legal effect of the instrument is only this, that the owners of the ship, the defendants, consented to allow Betham to go out as master of the ship, and to receive from him a certain sum, and to allow him to take all the profits ? A contract of that kind * certainly can be made between the owner of the * 298 ship and the master, but it would be open, if there were nothing more in the case, to very great objection, because it would afford an opportunity to the owners of the vessel, in a great many cases, to relieve themselves from the responsibility which attaches upon their character as owners, and leave the shipper of the goods to his remedy against the master alone, who, in many cases, is a person by no means sufficient to answer the demand which might be made upon him in case of loss or injury done. Now the instrument in question is one of a very peculiar character, and I will presently direct your Lordships' attention to such parts of it as appear to be

material. The instrument is a contract made between the owners of the ship, the persons whom I have mentioned, and Mr. Betham, and it begins by alleging that the owners of the ship agree to appoint, and do by this instrument appoint him the commander of the ship, subject to the condition therein mentioned, which is, that in case of his misconduct in the character of master, the person whom they have a right to send out to represent them shall have the power of dismissing him from the command. Now, if this instrument had contained nothing more the case would be one of the kind which I have first mentioned to your Lordships, but it contains a great deal more, for it then goes on to state that Mr. Betham, the master, shall be allowed and permitted to take on board the ship all such goods as he may think proper, and proceed therewith to Calcutta, in the East Indies, there to unload and reload the ship, and to return thence to the port of London; and upon her arrival there, and final discharge of her cargo, the intended voyage and service are to end. The owner further agrees that the ship shall be, before her departure, furnished with

* 299 * proper water casks, and provisions, and every thing of that kind; and he agrees also to provide the ship with coals and wood for cooking and dressing the passengers' provisions, for which the freighter is to pay the owner. The person who is, in the first instance, called the master of the ship, is now called the freighter, the term freighter applying to a person who takes the ship under a charter. The owner then stipulates that Betham shall pay him, the owner, freight for the use or hire of the ship, at a certain rate per ton here specified; and it is agreed that that shall not be paid until the ship's return into the port of London. Then he further agrees that the bills that may be drawn in Calcutta, in part payment of the freight of the goods that may be laid in there, shall be sent over to certain persons in this kingdom, who are to be trustees, and who are to apply the proceeds of those bills towards the payment to the owner of the balance of freight which may be due to him. There is also another provision. The ship being, in the first instance, intended to go from London to Calcutta, there is a provision that the

freighter shall have the liberty and privilege of employing the ship in the East Indies, for any intermediate voyage he may think fit, paying a certain sum. Then comes the proviso to which I have already adverted, namely, that if he misconducts himself as master, the agent for the owner, who is on board the ship, shall appoint another commander, without any injury to the rights of the owner upon the charter. That being the character of the instrument, the special verdict also sets out a memorandum of an agreement that was made between the owner and the same person, which specifies the sum he was to receive as wages, he having been previously appointed as master. The special verdict then proceeds to state the power of attorney, * which was given to a * 300 person who went as agent in the ship, upon the particulars of which it does not appear that any thing turns: it is therefore unnecessary for me to draw your Lordships' attention to it. Then the jury find as a fact, that this instrument was made *bond fide*, by which I understand them to mean, that the contract was really such as it purported and professed to be, that is, that it was a letting of the ship to the master for the voyage mentioned; and they further find, that the person who went out as agent on behalf of the owner carried with him the charter-party, and communicated it to the plaintiffs, who were the shippers of the goods. As soon as he arrived at Calcutta, he communicated to them the nature of the charter-party. They had already received a copy of it; so that they knew before the ship arrived the state in which the ship had come out, and were acquainted with the contract made between the defendants as owners of the ship, and Betham as the master. Now, the Court of King's Bench were of opinion that this instrument was nothing more than a contract between the owners of the ship and the master, the owners agreeing on their part, if he would pay a certain sum to them, that he should have for his own use all the profits over and above that sum; but, on the other hand, when the case came before the Court of Exchequer Chamber, it was argued more at length, and more elaborate judgments given, than in the Court of King's Bench; and that Court was of opinion that this instrument, although it did not con-

tain in terms any words by which the owners let or chartered the ship out to Betham, still it was in effect and in point of law, and in legal effect, a letting of the ship to him for that voyage, and he was therefore in the situation of the person whom I mentioned to your Lordships in the second * 301 proposition; * namely, that he was to all intents and purposes the charterer of the ship, and consequently that any contract made with him for shipping goods may be considered as a contract made with him as the owner *pro tempore* of the ship, and could not be considered as a contract made by the plaintiffs with the defendants, against whom the action was brought. I have already intimated to your Lordships that in this opinion of the Court of Exchequer Chamber, and in the reasons given by that Court upon the subject, all the Judges who were here upon the argument concurred.

For myself, I should say I am inclined to think that the judgment of the Court of Exchequer Chamber is right; and I shall have no hesitation on this occasion, and I hope I never shall have any hesitation, in acknowledging any error which I may have committed in the seat of justice, and in endeavouring, as far as I can, to correct that error. I shall, therefore, advise your Lordships to confirm the judgment of the Court of Exchequer Chamber, and reverse the judgment which I myself, together with the other Judges of the Court of King's Bench, have given in this case, thinking, as I do, that, upon the whole, that is the soundest judgment, and knowing, as I have already mentioned, that that is the opinion of almost every Judge in Westminster Hall.

Judgment of the Exchequer Chamber affirmed.

* APPEAL

* 303

FROM THE COURT OF CHANCERY.

DILLON v. PARKER.

1833.

JOHN JOSEPH DILLON, Esq. *Appellant.*Sir WILLIAM PARKER, Bart. *Respondent.**Devise. Construction. Election.*

In order to raise a case of election on a testamentary instrument, the intention of the testator must clearly impose an obligation to elect; and in order to hold a party to have made election, his acts must be conformable to the instrument imposing the obligation to elect, and not adverse thereto.¹

Where parties may elect between two titles, either as tenants for life or tenants in fee-simple, and continue in possession for near forty-four years, executing in the mean time various deeds, reciting that they took under the former title: *held*, that they have elected to take under that title, and their heir-at-law is precluded from claiming the fee under the latter.

Seem, the House of Lords will, under peculiar circumstances, hear two counsel for a respondent, although to hear but one on each side may

¹ See 1 Jarman Wills (3d Eng. ed.) 415 *et seq.*; (4th Am. ed.) 383 [385] *et seq.* and notes; Hyde v. Baldwin, 17 Pick. 308; Smith v. Smith, 14 Gray, 532; Smith v. Guild, 34 Maine, 443; Weeks v. Patten, 18 Maine, 42; Buist v. Dawes, 3 Rich. Eq. 281; Waters v. Howard, 1 Md. Ch. 112; Fulton v. Moore, 25 Penn. St. 468; Hamblett v. Hamblett, 6 N. H. 333; George v. Bussing, 15 B. Mon. 558; Hapgood v. Houghton, 22 Pick. 480, 483; Schroder v. Schroder, Kay, 584-586. In order to raise a case of election, the intention, as manifested by the will itself, must be clear and decisive. 1 Jarman Wills (3d Eng. ed.) 425, 426; Dummer v. Pitcher, 2 My. & K. 262. See also Crabb v. Crabb, 1 My. & K. 511; 5 Sim. 35; Blommart v. Player, 1 Sim. & Stu. 597; Parker v. Carter, 4 Hare. 411; Smith v. Lyne, 2 Y. & C. C. 345; Seaman v. Woods, 24 Beav. 381. When a case of election arises, the person who ought to make it must be shown to have known of his duty to do so, and must be proved to have done such acts as amounted to an election. Spread v. Morgan, 11 H. L. Cas. 588; 13 L. T. N. S. 164.

be part of the order made on advancing the appeal, on the petition of the appellant.¹

- * 304 * *Seem* also, that although it is usual, according to the orders of the House, to insert in the printed cases all the documents that are to be relied on, except the parties, to save expense, come to an understanding to refer only to some, yet the House will hear the documents so referred to read at length at the table of the House or by counsel at the bar; the opposite counsel being at liberty to examine and observe upon them.

August 15, 18, 19.

THE suit in which this appeal originated was instituted in 1814. The statements in the appellant's several bills, and the respondent's answers, together with the judgment and decree pronounced by the Master of the Rolls, are already reported. (a) That decree was affirmed upon appeal to the Lord Chancellor, by an order made on the 4th of May, 1822. (b)

The appellant appealed from that decision to this House, and was heard in support of his appeal in 1830, but being seized with sudden indisposition before he concluded his arguments, the further hearing was postponed. He next petitioned to be heard by counsel, and his petition having been granted, the case now came on for hearing, Lord LYNDHURST, before whom, as Lord Chancellor, it had been partly argued in 1830, presiding for the Lord Chancellor.

Sir Edward Sugden, for the appellant. — The power of devising the estates which were the subject of the settlement in 1741, and are now claimed by the appellant, was derived from an agreement entered into in 1766, between Sir Henry John Parker, and John Parker, his son. The respondent, admitting that agreement, says, there was contained

* 305 in it a proviso for making it * void, in the event of the death of John Parker in the lifetime of Sir Henry John Parker. Such a proviso is unreasonable and inconsistent with the acts of ownership exercised by the son over all this property. The son was in actual possession of the estates

(a) 1 Swanst. 859.

(b) Jac. 505.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1501; *The Queen v. Millis*, 10 Cl. & Fin. 534; *Macq.* 778.

from that time, and expended considerable sums of money, both on the house in Salisbury Court and on the mansion at Talton, where he resided. The dominion exercised by him over the house in Salisbury Court fully entitles your Lordships to presume an unconditional conveyance, from the father, of the whole interest in that house. The son, in the year 1768, constituted Mr. Stephens his attorney and agent, "to view and survey" (in the words of the power of attorney) "my message or tenement situate in Salisbury Court, Fleet Street, &c.; and also for me and in my name to receive and take all the rents, &c., of my said message, &c.; and upon payment of the said rents, &c., for me and in my name, the moneys so by him received to pay over unto me, my executors or administrators." This power of attorney was drawn up by Mr. Hunt, the solicitor of Sir Henry John Parker, by direction of Sir Henry, as appears from a letter found among the papers of Mr. Hunt, in which Sir Henry John Parker says, "You will fill up a proper authority for Mr. Stephens to act for Mr. Parker, in regard to the house in Salisbury Court." An agreement for a lease of the house in Salisbury Court, entered into by John Parker, could not have any validity, but on the presumption that there had been a previous conveyance of the whole interest in it from the father to him. A jury would, upon those facts in evidence, presume a conveyance. Your Lordships, therefore, cannot come to any other conclusion than that the son was seised in fee of the Salisbury Court estate, and that it passed by his will to his sisters, *Margaret and Ann *306 Parker, in fee. In that will, after giving his father a life-interest in all his freehold and leasehold estates, and after disposing of the remainder of the estates derived from his grandfather Page to his sisters of the whole blood, he says: "Also, I give and devise the manor and capital messuage, called Talton, with the estates thereto belonging; the farm called Tredington Farm and Knowland's Farm, in the parish of Tredington, and all other my manors and estates in Worcestershire and Warwickshire, my house in Salisbury Court, Fleet Street, London, the other moiety of my estates at Hatch, and all other estates whatsoever and wheresoever

which descended or came to me, or which shall descend or come to me from my father, unto my two sisters, Margaret and Ann Parker, their heirs, executors, administrators, and assigns for ever, as tenants in common." After bequeathing some pecuniary legacies, he gives all the residue of his personal estate to his father, and appointed him executor of his will, if he should be living at the time of his own decease. By a codicil to this will, confirming all the benefits given thereby to his father, he devises to him his newly purchased estate, and directs the cancelling of a bond for 1,000*l.* due from his father. It is impossible, in looking at the will, to say it was not an absolute devise of the whole of the estates named in it.

The next point is, as to whether a case of election arose on this will and codicil. Looking to the rental of the estates, your Lordships may see that it was the interest of Sir Henry John Parker to make an election under this will. The settled estates now claimed by the appellant, as the heir of Ann Parker, and under the will of John Parker, consisted of the house in Salisbury Court, let for 100*l.* a year; the * 307 Talton estate * bringing an income of about 150*l.* a year; and the Tredington leasehold premises, worth 100*l.* a year. Sir Henry John Parker, if he elected to confirm the devise of these in his son's will, still remained, under that will, entitled to the enjoyment of them during his life, relinquishing to his daughters the power of further disposing of them. What were the benefits offered to Sir Henry's acceptance, on the other hand, by the will and codicil? He got the newly purchased estate in fee, which was afterwards sold for 1350*l.* He took a life-interest in the estates of Hatch and Shorter's Court, which had undoubtedly belonged to the son, under the will of his grandfather, and were worth 660*l.* a year. These devises, together with the residue of the son's personal estate, which was of considerable amount, offered to Sir Henry John Parker immediate relief from the difficulties which were then pressing on him. It was, therefore, the interest of Sir Henry John Parker to take under the son's will, and he did make an election, by taking all these benefits under it. If, then, it has been shown that a

question of election was raised on the son's will, and that the father elected to take under it (and that he made such election is proved by various undeniable acts of ownership), the estates now claimed must have passed to Margaret and Ann Parker, and to the appellant, as heir of the latter, by the lapse of her devise of them to Harry Parker.

But it is alleged that there is another question of election raised on the will of Sir H. J. Parker. Now, circumstances in which an election arises are as if A. by will gave his estate to B., and gave to another an estate which belonged to B., then B. has a choice whether he will take A.'s estate or keep his own: he cannot take under the will and retain his own estate in opposition to it. But there cannot be a case of election * where a testator gave to a person an es- * 308 tate, or part of an estate, which belonged to that person. This was the case with respect to the life-interest given by Sir H. J. Parker to Margaret and Ann Parker, to whom they had belonged in fee under the will of their brother. No matter what acts they have done, the fee remained in them until they had actually divested it out of themselves. They sold or mortgaged their own estates to pay their father's debts; there is no election in that. They took no benefit under his will; and such was the state of his affairs at the time of his death, and long before, that upon the sound construction of his will no case of election was raised as against the daughters. They neither relinquished nor bound themselves by any act of theirs to relinquish their right to the estates in question. On the contrary, Ann Parker, by her will, made with the privity of the respondent, and without objection on his part, expressly asserted her right to them in fee. Upon the whole, therefore, it is submitted that the decree of the Court below ought to be reversed, and the appellant declared entitled to these estates.

The Attorney-General, for the respondent. — The will of John Parker contained no words descriptive of his title to those estates. There was no authority for those devises, adverse to the rights of Sir Henry John Parker, and no case of election could arise as against him on this general devise.

We have the opinion of Sir THOMAS PLUMER, at the Rolls (a), and of Lord ELDON, upon appeal (b) to him, that no case of election was raised in the son's will. His description of this property in his will was as if it was to come to
 * 309 * him from his father—a very natural description, if he survived his father. The father in his will considered the property to be his own, not as taking it from the son, but in his old title, which was never renounced by him. The father's will, made after the son's death, contained assertions directly contrary to the supposition that he took these estates from his son. If the will of John Parker has raised a case of election as against Sir H. J. Parker, his daughters, Margaret and Ann, were interested in the question of election, and might call on Sir Henry to elect; but they never did so call on him; on the contrary, Margaret and Ann took large benefits under their father's will, by which he disposed of the property claimed by the appellant. They took possession of all Sir Henry John Parker's property by virtue of his will; and describing themselves as his devisees, they made titles to trustees, and by repeated acts done by them in the character of devisees, confirmed the dispositions made by the will, and elected to take under it. Was it, therefore, now competent to the appellant, claiming under these ladies, to dispute the dispositions of that will? The equity under which the appellant claims, if it ever existed, arose upwards of forty-three years before he filed his bill, and was never asserted by the parties through whom he makes claim. The length of time during which this claim lay dormant is an additional argument against the assertion of it, as was observed by Lord ELDON, who compared it to the case of *Cholmondeley v. Clinton*, (c) and suggested that the claim was barred by time, as not kept alive by continued claim (d).

Mr. Pepys rose to follow on the same side.

* 310 * *Sir Edward Sugden* objected.—The order of the House was, to hear one counsel only on each side.

(a) 1 Swanst. 359.

(b) Jac. 505.

(c) 2 J. & W. 1.

(d) Jac. 505.

The appeal was advanced upon the appellants petition on that condition.

Mr. Pepys. — The respondent was no party to that petition, and no order was made upon it to the effect of precluding him from being heard by two counsel.

LORD LYNDHURST. — The appellant's case was argued before at the bar of this House, by the appellant himself, with great ability. His counsel has been now heard, and he will also have a reply. It is but fair, notwithstanding any order that may have been made, that two be heard on the other side; that will still be only two to three.

Sir Edward Sugden thought himself at all times bound to submit to the orders of the House; but for the future, in like circumstances, he should feel it to be his duty, on behalf of his clients, to claim a hearing for two counsel.

Mr. Pepys then proceeded. — There cannot be a case of election unless there are words in the will showing the testator's intention to dispose of property which was not his own. No such words are found in John Parker's will. The strength of the appellant's case rests on presumptions of a conveyance of these estates in fee to the son; but there was no evidence of the fact, and the only conveyance of which any knowledge was obtained, was that of 1766, which was accompanied by a proviso, that the estates therein named were to revert to the father on the son's marrying without consent, or dying in the lifetime of his father. * But * 311 it was not of the least consequence here to show, that a question of election arose on the son's will, if no election was made by the father. In order to election, he must be apprised of the value of the different rights, and of the obligation to choose between them. The mortgage of the son's estate by the father is no proof of election by the latter, and beyond that there is no ground for even alleging that he ever did any act implying election.

But, on the other hand, no one can doubt that there was a

case of election raised on the father's will; and that the daughters, Margaret and Ann, did make such election, was manifest from the deeds executed by them, and their letters to trustees and agents, in which they described themselves as devisees under their father's will. I now beg to direct your Lordship's attention to those documents.

Sir Edward Sugden. — These documents are not in the printed case, and no copies of them were furnished to the appellant, although he says he applied for them.

Mr. Pepys. — The respondent printed all that he relied upon. It is not the practice of this House to print all, but merely to refer to them; and the object of that is to save expense.

LORD LYNDEHURST. — It is usual here to print all documents that the parties rely upon, except on an understanding between themselves, and for the purpose of saving the expense of printing, they content themselves with references. Any matter of evidence that is not printed may now be read by the reading clerk at the table here, or by counsel at the bar, where the other side may look into the matter and observe upon it.

* 312 * *Mr. Pepys* then read extracts from a series of deeds executed by Margaret and Ann Parker from the year 1772 to 1798, and from letters written by them during that time, and also from letters written by Ann Parker subsequently, from all which he concluded that it was the clear intention of those ladies to take the property in dispute under the will of their father, inasmuch as they uniformly described themselves as devisees under it, and never made or claimed title under the will of their brother.

Sir Edward Sugden, in reply. — There is no point of resemblance in this case to that of *Cholmondeley v. Clinton* (a), and it is absurd to talk of time running against Margaret and Ann Parker, or of the necessity of continual claims in their behalf.

(a) 2 J. & W. 1.

They were in possession of their estate in fee under their brother's will, during the life of Sir Henry John Parker. They never parted with the fee. How could their own possession raise an adverse claim against them? The appellant's title did not accrue until after the death of Ann, the survivor of the two. The enjoyment of these estates, from the death of Sir Henry John Parker in 1771 to the death of Ann Parker in 1811, was consistent with the title of the appellant. At the death of Ann Parker he claimed the house in Salisbury Court by virtue of her will, and the other estates as her heir, the devise of them to Sir Harry Parker having lapsed by reason of his death in the lifetime of the testatrix. The appellant's title to these estates, especially to the Salisbury Court estate, is fixed on grounds perfectly immoveable. What is the fair presumption of John Parker's dealing with this property? Expending large sums of money on it, and making a lease for twenty-one years of the house * in Salisbury * 313 Court? All his acts evidence a conveyance to him.

The judgment of Sir THOMAS PLUMER, so much relied on, is more an argument than a judgment; and Lord ELDON, in affirming it, decided without his usual consideration of the case, as was evident from his comparing it with *Cholmondeley v. Clinton*. There is a case of *Edwards v. Morgan (a)*, in the Court of Exchequer, where Sir WILLIAM ALEXANDER, C. B., whose decision was afterwards affirmed on appeal to this House, lays down the law as to questions of equitable election, in words that are applicable to the present case, and in favour of the appellant. Sir Henry John Parker's first mortgaging and then devising away the estate given him by the son's will were distinct recognitions of that will, and confirmed it in every part.

Judgment. August 19.

The question being postponed for consideration,

Lord LYNDEHURST, on a subsequent day, moved the judgment of the House as follows: My Lords, this is an appeal from a decree of Lord Chancellor ELDON, who affirmed a previous

(a) 13 Price, 785.

decision of the Master of the Rolls, Sir T. PLUMER. The question relates to certain property that formed the subject of the marriage settlement of Sir Henry John Parker, in the year 1741. There is no question that the title at law to the property belongs to Sir William Parker, the respondent. It is admitted that the title at law belongs to him, but it is contended that circumstances of equity, arising several years ago, so far back as the year 1769 or 1771, gave to the appellant an equitable right to control the legal title of the respondent. Where the legal title is admitted, the party claiming under an equitable title, as circumscribing and controlling the legal title, must make out a clear, distinct, and satisfactory * 314 case. The * question is, then, whether you are of opinion that upon the arguments at the bar such a satisfactory case of equity has been made out as ought to induce you to give judgment in favour of the equitable title, so as to displace the legal title of the respondent.

The first question is raised upon the will of John Parker, the son of Sir Henry John Parker. It was argued on the part of the appellant that this will raised a case of election as against Sir Henry John Parker. The Master of the Rolls was certainly of opinion that no case of election was raised ; but when the case came before him, the agreement between the father and son, by which it is presumed by the appellant that the father parted with the fee in the settled estates, was not in evidence. Some attempt was made to introduce it, but it failed. Afterwards, however, when the case came before Lord Chancellor ELDON, some evidence of the agreement was given, by the appellant reading the agreement out of the answer. Taking the facts stated in it to be true, and taking the rights and situation of the parties to be consequent on it, and connecting it with the obscure and inaccurate terms contained in the will of John Parker, the noble and learned Lord who preceded me on the woolsack said, that it was difficult, if not impossible, to come to a satisfactory conclusion as to what the intention of the testator was, as expressed in his will. I have read it over and over, and attended anxiously to it since I have heard the able arguments that have been urged upon it, and at this moment I doubt whether it is pos-

sible to come to a sound conclusion as to the meaning of the testator; whether he intended, in the event of his dying in the lifetime of his father, to dispose of that property is the question we have to consider; and unless I can see what the meaning of the testator was, the foundation of the case of election has altogether failed.

* But assuming, for the sake of the argument, that * 315 it was the intention of John Parker to raise a case of election; that is, to dispose of what he was not entitled to dispose of;¹ the next point which the plaintiff must establish is, that Sir Henry John Parker chose to take under that will, and not in opposition to it. In the evidence I find nothing clear or satisfactory to my mind to show that he had any intention to take under the will. Looking at the will itself, I am not satisfied that he knew he was bound to take under it, or that a case of election was raised. There is nothing to satisfy me that he thought he was bound to elect, or that he did elect. I find he took benefits under the will, but at the same time he acted in opposition to it. That fact is as strong to show that he did not elect to take under the will, as his acting in conformity to it would have shown the reverse. I agree with Sir THOMAS PLUMER that Sir Henry John Parker acted as much in opposition as in conformity with the will. That he took considerable benefit under the will, and more benefit by adopting it than by rejecting it, would be an argument to show that he had elected, if there was any thing to show that he had been called on to elect. I find that within a few weeks after the death of John Parker, the son, Sir Henry John Parker, made a disposition of the property entirely at variance with John Parker's will; instead, therefore, of coming to the conclusion that he did elect to take under the will, I should say that the evidence not only did not show a case of that sort, but that there was manifested as strong an intention to take adversely to, as under, the will, and therefore no case of election was made out.

Much of the argument has been employed at the bar with respect to the language of the agreement, and the proviso said to be contained in it. That was made evidence

¹ See 1 Jarman Wills (3d Eng. ed.) 415.

* 316 * by the pleadings, for it was read from the defendant's answer, and there is nothing to show that it was not an existing agreement between the parties. It was said that the proviso was not sufficiently set forth, but I think that it was, sufficiently at least to lead to that conclusion. It is stated also that the proviso is altogether unreasonable, and that the agreement, taken in connection with it, is one that cannot be enforced. I agree with the noble and learned Earl (ELDON) who decided this case, that it is quite impossible for us at this distance of time, sixty years from the transaction, to say whether the agreement was reasonable or not; something must depend on the character, situation, and circumstances of the parties, on the sort of stipulations made between them, and on the state of the family at that time. It was argued, that by some subsequently executed instrument this proviso or condition was discharged; but that is mere conjecture, mere probability, or rather possibility. I certainly can find no evidence of such a circumstance. It was further argued, with respect to a part of the property, namely, that in Salisbury Court, that that was disposed of by the father in fee to the son. I cannot find any evidence to satisfy me of that: the son took an interest in the property sufficient, as he thought, to authorize him to grant a lease for twenty-one years; but there is no further evidence to satisfy me what the nature of that interest was. As to the first part of the case, in consequence of the lapse of time and death of witnesses perhaps, the appellant has not succeeded in establishing a clear case of equity: yet that is necessary for him to do before he has any right to ask for your Lordships' judgment, to displace the legal title of Sir W. Parker.

But this is not all. The appellant has another difficulty, arising from the will of Sir Henry John Parker:

* 317 * that will has opened a case of election. There can be no doubt if that will offered a case of election, that these ladies did elect to take according to it. The deeds executed in the lifetime of Margaret and Ann show, to my satisfaction, that they did intend to take under their father's will and not under the will of their brother. They described themselves as devisees for life, and as being so under that

will, and as holding under it. In addition to that, after the death of Margaret, letters were found, in which she also described herself as holding this property under the will of her father. As far, therefore, as the declaration of the parties is evident of intention we have it, for the purpose of showing that these ladies intended to take under the will of their father, and not under the will of their brother. We are asked what motive they had for preferring the will of their father, for they gained no advantage by doing so; that the estate itself was mortgaged, and with respect to the personal property, that it was not equal to the debts and legacies. I repeat, that at this distance of time it is impossible to say what was the motive that influenced their conduct. They might think that the settlement of the property under that will was rightly made. Many other reasons might operate on their minds to induce them to take under their father's will; but it is sufficient for us to see that they did so, without, at this distance of time, attempting to discover and explain their motives. It was said that they were misled by their law agents, and reference was made to a case which was put for the opinion of Mr. Maddox, in which this question of election was not raised. That seems to mean that the trustees and the law agents were induced to mislead them for the sake of a small pecuniary benefit to themselves, a legacy of 50*l*. I admit, that on the statement of the case, Mr. * Maddox made no reference to the question * 318 of election; but Mr. Hunt, who was their law adviser, lived near them, and had opportunity enough to inform them of the real state of the matter. It is too much for us at this distance of time to deal in conjectures of this sort, or to suppose that they were ignorant of the facts in which they were so deeply interested. Independently of these considerations, there is a question of time, and the learned counsel admits that he does not understand how that has been passed by. Here the equity was raised in 1769. The persons under whom the plaintiff claims had an opportunity of raising that question at that time; they had an opportunity of calling on the father to make his election; they did not do so, but allowed the question to lie dormant forty years; and from

the principles of equity it follows, that that alone should be a bar to the plaintiff's claim. I beg leave to move that this judgment be affirmed without costs.

Judgment affirmed without costs.

FROM THE COURT OF SESSION.

EARL OF MANSFIELD v. SCOTT.

1833.

WILLIAM, EARL OF MANSFIELD *Appellant.*
RALPH SCOTT *Respondent.*

Master and Servant.

A master having admitted that, by his factor's agreement, he promised to his servant, in addition to his ordinary wages, a present of 20*l.*, the service to be at all events till the end of one year; and that sum not having been paid at the expiration of the year, and the service having continued for several years: *held*, that the contract was renewed in all its parts from year to year; and, nothing being said to the contrary by either party, that 20*l.* was due for every year of the service.¹

June 15, 17.

THIS was an appeal against interlocutors pronounced in an action raised by the respondent in the sheriff's Court of Perthshire, for making good an allowance of 20*l.* a year, from the year 1810 to 1829, under a contract of service, and removed by bill of advocation into the Court of Session, at the instance of the appellant. The alleged contract was contained in the following instruments:—

“*Memorandum.*—It is hereby agreed, and finally understood, that Ralph Scott, from the 26th May, 1810, is to take

¹ See *Tatterson v. Suffolk Manuf. Co.*, 106 Mass. 56.

and fulfil the office of hedger and ditcher on the farm and estate of Scone, in a good and workmanlike manner, whereof the same conditions as his predecessors hath (a) already been paid, * is still to become his wages from the * 320 superintendent and tenants of the said farms: and, as conscious of his assiduity towards the work, as addition to the above, the Earl of Mansfield is to make him an allowance of 20*l.* per annum. Done by us at Kenwood, 20th April, 1810.

“(Signed) ANDW. MIDDLEMISS (for Lord Mansfield).

“R. SCOTT.”

The other minute (which was executed soon after) was in these terms: —

“It is agreed between Andrew Middlemiss, for Lord Mansfield, and Ralph Scott, That Ralph Scott is to go to Scone; is to superintend the hay harvest; is to bind hay, and instruct others in that process: That he is also to be employed as hedger, to have the care of the fences upon Lord Mansfield’s farm, and of the fences of such tenants as do not choose to keep them in order by their own labourers. He is to receive the same wages as were paid to the hedger who was lately employed; and when at hay harvest or other work, he will receive the wages of the country. But in addition to these, as an encouragement for his greater assiduity, Lord Mansfield is to make him a present of 20*l.*; and it is also understood that Scott is to continue in Lord Mansfield’s service at all events till Whitsunday, 1811; and until this agreement shall be terminated by the demise of either party.

“(Signed) ANDW. MIDDLEMISS (for Lord Mansfield).

“RALPH SCOTT.

“Kenwood, 14th May, 1810.”

The respondent, in pursuance of this agreement, left London in May, 1810, for Scotland, and there entered upon

(a) Other breaches of concord, and many misspellings appeared in the minutes of the original agreements.

* 321 the employment of hedger and ditcher on the *appellant's estate of Scone, taking charge also of the appellant's hay-harvest, and continued in these employments down to 1829. He admitted payment from time to time by the appellant and the tenants on the said estate, of the price of the work performed by him thereon, according to the extent of the particular work. This claim of the additional allowance of 20*l.* a year for 19 years, amounting to 380*l.*, with interest on each year's allowance, was resisted by the appellant, on the ground that the allowance was to be for one year only. The respondent, in aid of his construction of the minutes of agreement, produced two letters written to him by Middlemiss (since deceased); one of them, dated Caen-Wood, 3d August, 1810, and franked by the Earl of Mansfield, had these words: "I have to request your answer to this, and say how you are getting on with the haymaking, the people, the quantity of hay per acre, and your opinion of the dykes; and be very particular in any thing in the sort, but say nothing more than you wish to his Lordship to know, as this letter is by his directions, and I shall show him your answer." The other, dated from the same place, 9th of May, 1812, in answer, as the respondent alleged to a former letter of his own, asking for explanation of the contract, contained these words: "I was happy to hear you so much recommended by Lord Mansfield the other day; wherein I strongly urged the loss I sustained by parting with you. What you mentioned in your last letter as Lord Mansfield's present, I consider it as per annum."

The sheriff-substitute of Perthshire, after due consideration of the pleadings and evidence, pronounced the following interlocutor, to which the sheriff-depute, upon appeal to him, adhered, and decreed accordingly:—

"The sheriff-substitute having advised the closed
* 322 *record, finds it admitted by the defender, that previous to the pursuer's leaving England, he received employment under his Lordship at Caen-Wood, as a hedger and ditcher, and in haymaking; and that it was agreed that he should go to Scone in this country, where he was to be

employed in similar operations on that estate; and, as an inducement, he was promised a present of 20*l.*, in addition to the ordinary wages in the place: that the only evidence in process of the terms agreed upon, is contained in two minutes of bargain, dated Caen-Wood, 20th April, 1810, and 14th May that year, by ‘Andrew Middlemiss, for Lord Mansfield,’ and by the pursuer: finds it admitted by the defender, that Middlemiss had charge of hiring farm servants for him at Caen-Wood, but had no such charge relative to his Scotch estates; and in any thing that Middlemiss may occasionally have done in relation to these estates, he always acted on special instructions; and the letter by Middlemiss to the pursuer, dated 3d August, 1810, desiring particular information how he was getting on, to be communicated to his Lordship, appears to have been addressed and franked by the defender: finds that the minute of the 20th April bears, that an allowance of 20*l.* was to be made to the pursuer per annum, in addition to his wages, as conscious of his assiduity towards the work; and that the subsequent minute of 14th May bears, that, as an encouragement for his greater assiduity, the defender was to make him a present of 20*l.*; and it was understood that the pursuer should, at all events, continue in his service till Whitsunday, 1811: finds, that no subsequent alteration having been made on the terms of the bargain, the pursuer is entitled to the said allowance yearly, during the time he remained * in the defender’s * 323 service at Scone, but that not having demanded payment as it fell due, he is only entitled to interest at the rate current at the bank in Perth, where the defender’s business was transacted: and decerns, with 8*l.* 1*s.* of expenses, and the expense of extract.”

The appellant having afterwards removed the cause by bill of advocacy into the Court of Session, the Lord Ordinary, after hearing the parties’ procurators, “repelled the reasons of advocacy; remitted *simpliciter* to the sheriff, and decerned; finding the advocator liable in expenses.” To which interlocutor his Lordship added this note:—

“The case is not without difficulty, but the Lord Ordinary

sees nothing sufficient to induce him to alter the judgment of the sheriff. He is of opinion that the question must be regulated by the minute of 14th May, 1810; and that its terms, when *clear*, cannot be controlled by any thing in the previous minute of 20th April. But it does not appear certain, looking at these alone, that the 20*l.*, though denominated a present, was not meant as a part of the wages, or allowance, which the pursuer was to receive for his services during the year for which he was engaged by the minute. It is stated to be in addition to the wages which the pursuer's predecessor had been in use to receive; and, considering the circumstances of the parties, it does not seem unreasonable that an addition to this extent should have been made. Besides, the cause assigned for giving it is one no less applicable to the services for subsequent years than to those of the first. It is not to be given because the pursuer might be put to expense in removing to Scotland, or for any reason exclusively connected with the year to which the missive relates,

* 324 but as an *encouragement for his greater assiduity, as a remuneration for his expected services during the year for which he is engaged. Of consequence, it may be not unreasonably inferred, that if the pursuer, without any further bargain, continued his services, which the defender, by suffering him to do, must be presumed to have approved of, he was entitled, under tacit relocation, to the continuance of the same emoluments. Now, if the minute can bear this interpretation, or, if its meaning is in so far doubtful, the Lord Ordinary thinks it not incompetent to look to the previous minute for explanation. This document, which does not specify any particular period of service, expressly states the 20*l.* to be an annual addition, and assigns the pursuer's expected assiduity as the reason. There seems no ground to presume that Middlemiss, who had no authority from his situation to hire servants for Scotland, would have entered into such a bargain for the noble defender without some communication with him; and the much more ample and distinct specification of the nature of the work to be performed, contained in the second minute, may sufficiently account for its existence, without supposing that Middlemiss had exceeded

his instructions in the first. Indeed, had he acted so improperly, it is not likely that he would have been retained as the person to make the second bargain.

“It was argued, as proving the pursuer’s *mala fides*, that, having doubts as to the amount of his wages, as appears from the letter of Middlemiss to him of 9th May, 1812, he did not apply to Lord Mansfield for an explanation. But the Lord Ordinary is not satisfied that this is a fair inference. It is not stated whether Lord Mansfield was or was not at Scone in spring, 1812. But if he was not, it was natural for * the pursuer, when his service for the second year * 325 drew near a close, to apply for an explanation to Middlemiss, the person who had made the agreement with him on the part of his Lordship ; and having learnt from him that he considered the 20*l.* to be an annual payment, to conclude that this was the case. The pursuer’s accounts and receipts produced have no relation to his annual wages, and contain no general discharge of what might be due to him. The accounts relate entirely to specific pieces of work, mostly drains and dressing of ground, executed in great measure by labourers employed under the pursuer ; and his receipts are just for the sums specified in the accounts. It is, no doubt, somewhat strange, that he should have allowed so many years to pass without any settlement of his wages ; but 20*l.* was undoubtedly due to him ; and there is just as little the appearance of his having asked for, or been paid, this sum, as there is in regard to any of the subsequent sums sued for.”

Against this interlocutor the appellant presented a reclaiming note to the Lords of the first division of the Court, and they having advised the same, pronounced the following interlocutor on the 21st June, 1831 : —

“The Lords having advised this reclaiming note, and heard the counsel for the parties ; in respect it appears to be the *bonâ fide* meaning of the parties, that the allowance or present of 20*l.* was to be annual, adhere to the interlocutor reclaimed against. Of new, find the defender liable in the pursuer’s

expenses, appoint an account to be given in, and remit it to the auditor to tax, and to report."

From these several interlocutors the noble appellant now appealed to this House.

* 326 * *Mr. Knight* and *Mr. Murray*, for the appellant. —

This claim of 20*l.* a year from the year 1810 was never heard of by the appellant until the respondent was about leaving his service, in 1829. For nineteen years he went on receiving from time to time the price of his wages from the noble appellant's factors in Scotland, and giving regular discharges for the same, without complaint or objection. The appellant admitted, from the commencement of this action, that a present of 20*l.* was promised to the respondent, as an inducement to go to Scotland, and to bear the expense of his removal; but it was never intended that 20*l.* should be paid him annually, in addition to his ordinary wages. Middlemiss had authority to hire farm servants for Caen-Wood, but not for the appellant's farms in Scotland, which were under the management of the factors there. The minutes of agreement founded on, were wholly unauthorized and never homologated by the appellant, in so far, at least, as respects the payment of this 20*l.* a year, in addition to the respondent's ordinary wages. But even if it were to be held that these instruments were obligatory on the appellant, the last must be held to supersede the first, and in that there is no stipulation that the respondent was to have 20*l.* a year, but a present of 20*l.* It is probable that the factor in Scotland paid that present at the end of the first year, but as he cannot now be brought forward to prove such payment, the appellant has been willing and offered to pay it, although a stale and suspicious demand. As to interest, none can be due in any event; none is stipulated for in the alleged agreement, and none could accrue upon the nature of this claim, which was not made until 1829, although the respondent well knew that in 1827 an advertisement was published in the newspapers

* 327 in Scotland, calling on all persons who had * claims on the appellant to produce them, upon the change of the

appellant's factor. The respondent's silence then, and for two years after, as well as for seventeen years before, coupled with his having granted annual discharges for the wages of all work done by him for the noble appellant, imply a discharge from all previous demands, in the same way as a factor, after having settled accounts, has been held not entitled to demand a salary, as in *Graham v. Roughead*. (a) The inference from this long silence is not to be removed by saying that the respondent did not call for payment of this claim, because he had no occasion for the money then, and wished it to accumulate as a fund for his old age. Lord Mansfield was not a banker for his hedgers, to be liable to them for interest at the rate of 5 per cent., when $2\frac{1}{2}$ per cent is all he could himself get for his money. There was no place in the circumstances of this case for the doctrine of tacit relocation. The second minute had the express words, "a present of 20*l.*," and beyond that the respondent could not claim; and that he had not received that present long ago was entirely his own fault. His regular wages were duly paid to the respondent during every year that the service continued. They submitted that for these reasons the interlocutors ought to be reversed.

The *Lord Advocate* and *Mr. Kaye*, for the respondent.—The interlocutors, finding the respondent entitled to 20*l.* a year, over and above his ordinary wages for labour, during every year he continued in the noble appellant's employment, are in all respects well founded. It was useless to deny that Middlemiss was the avowed *agent of Lord * 328 Mansfield to hire farm servants, and make contracts of this sort with them; it was his duty, and not the duty of the factor in Scotland, to contract with this man. Middlemiss is admitted to have had authority to make contracts with farm servants in England. This was an English contract. The 20*l.* was not a mere gratuity, or bounty, or present, but part of the wages agreed upon for the first year, of which agreement the writing of April, 1810, was evidence; and the service, not terminating with that year, the contract ran on with the service by tacit relocation *Baird v. Don*. (b) This doc-

(a) Morr. 6534.

(b) Morr. 9183.

trine is applied in every-day practice in Scotland, and though taken from the Roman law, Heinec. ad. Pandect, lib. 19, tit. 2, § 319, it belongs to universal jurisprudence. The contract is to be expounded according to the *bonâ fide* intentions of the parties engaging in it. Is it reasonable that the respondent would give up the high wages of Highgate and Caen-Wood, where he had full employment, for the comparatively low and uncertain wages of Scotland? No; he was to have the same wages as his predecessor, and, "as conscious of his assiduity towards the work, in addition thereto, the Earl of Mansfield was to make him an allowance of 20*l. per annum.*" That was the literal interpretation of the first minute, and the only object of the second was, to define the respondent's duties, and add the employment of haymaking and superintendence of the harvest, which were not in the first instrument; both writings are consistent, and make up the contract. The respondent having completed the first year of the service, was then fully entitled to the allowance of 20*l.* After he

entered upon the second year, the agreement became,
 * 329 according * to established principles, renewed in all its parts, nothing being said by either party to the contrary. If any doubt could be entertained upon that, it was removed by the letter of Middlemiss, saying that he considered the allowance to be "*per annum.*" The noble appellant was, therefore, bound to pay this man the same additional allowance for every year that he remained in his service. It is true, these instruments are not formally executed, and, therefore, not probative, but they are not the less binding on the appellant; implement followed on them on both sides; the appellant accepted the service rendered by the respondent in pursuance of these contracts, and his acquiescence in it amounts to a homologation, which supplies the defect in form. (a) The objection to the respondent's claim, on the ground of delay, goes for nothing; for the allowance for the first year, which is admitted to be due, was longer than any in being claimed. The respondent, not wanting it for immediate use, thought fit to let the sum accumulate in his employer's hands, for support in his old age.

(a) Tait on Evi. 123.

To show that the respondent was also entitled to interest on the yearly sums remaining due to him, the learned counsel cited 1 Bell Comm. 557.

Judgment. June 17.

THE LORD CHANCELLOR, in moving the judgment of the House, said : — I will not trouble your Lordships to go over the whole of this case. The Court below confined itself exclusively to the two documents of April and May, 1810, and no question was raised as to their admissibility or authenticity. Although great doubts appear to me as to the admissibility of these instruments in evidence, and as to the authority said to be * given by Lord Mansfield to Middlemiss to * 330 make this contract, yet, if your Lordships will look into the defence to the action in the Court below, you will find the Court there, confining itself to the construction of the instruments, passed over the question of their admissibility, which to me appears to be the only or principal question in the case. The Judges below proceeded upon the ground that the defence set up entitled them to look only to the construction of the instruments ; “ The defender does not admit that he is bound by the writing signed by Middlemiss, founded on in the present summons ; and, in particular, it is denied that Middlemiss had any power to enter into the alleged agreement.” The appellant goes on to say : “ the defender supposed the pursuer had got the money in his account for work done in the first year of his engagement ; and that he has not got payment is entirely his own fault.” It is clear from this that he did not get the 20*l.*, and the passage amounts to an admission that the defender was bound by Middlemiss’s agreement to pay so much. If that 20*l.* had been paid, the case for the respondent would be very different. The appellant, in his defence, submitted the following pleas : “ No agreement was ever made or authorized by the defender, under which the pursuer was to have 20*l.* a year, in addition to his ordinary wages, as libelled. The writings founded on in the summons are not obligatory on the defender, by whom they are not signed, by whom they were not authorized, and by whom they have never been homologated or confirmed, in

so far at least as respects the alleged agreement to pay the pursuer 20*l.* a year in addition to his ordinary wages." If the defender stopped there, it would be something like a denial, but the defence goes on: "Supposing the

* 331 * writings mentioned in plea second were held to be obligatory on the defender, the last (in so far as the two are inconsistent) must be held to be the regulating document, and to supersede the first." This is not a denial, but an admission that there was some agreement; and as the defender makes mention of an agreement, and none but this is suggested, your Lordships will be of opinion that the sheriff's interlocutor was well founded. The question is not, what would have been done by the sheriff had a different course of defence been adopted. If the sheriff had not been satisfied by the admissions, he would probably have ordered the case to be heard upon issues. I am not quite satisfied with the evidence, but whatever difficulty I have on that first and fundamental part of the case, a difficulty which arose from the manner in which it was presented to the sheriff, who was prevented by the admissions from sending issues to a jury court; yet, under all the circumstances, I am not disposed to recommend to your Lordships to take a view of the case different from the sheriff, but to affirm his judgment, which I think the remainder of the case justifies. The whole contract applies to a hiring for a continued time, and the present mentioned must mean a yearly present. Scott was to continue in the service at all events for one year, and till the agreement terminated by the demise of either party. If Scott left at the end of the first year, he was to have the 20*l.*, and the words "at all events" imply a contemplated continuance of the service. The delay in asking for this allowance was matter for consideration, but not so strong as to prevail against the claim, for the respondent had an undeniable right to 20*l.*, and it being admitted that he has a right to that sum for one year, he has an equal, or some, right to the like sum for all

* 332 the years of his service. * I think the judgment ought to be affirmed with simple interest, and without costs.

Lord WYNFORD concurred, and after referring to several

passages of the printed cases on both sides, from which he drew the same conclusions, his Lordship said: "As to costs, I agree that the respondent ought not to have costs of the appeal, on account of the doubts and difficulties which the Lord Ordinary said attended the case; for when the Judge below expresses his doubts, that is an encouragement to parties to appeal."

The interlocutors were affirmed accordingly, with simple interest, as at the Bank in Scotland, and without costs.

* APPEAL

* 333

FROM THE COURT OF CHANCERY.

KING OF SPAIN *v.* HULLET AND WIDDER.

1833.

THE KING OF SPAIN *Appellant.*
HULLET and WIDDER *Respondents.*

Practice. Cross-Bill. Foreign Sovereign.

A foreign sovereign prince, being declared entitled to sue in the Court of Chancery here in his political capacity, claims the privilege of putting in an answer, by his agent, or without oath or signature, to a cross-bill, filed against him by the defendants to his original bill: *held*, that he stands on the same footing with ordinary suitors as to the rules and practice of the Court, and is bound, like them, to answer a cross-bill personally and upon oath.¹

¹ Where a foreign state comes voluntarily as a suitor into a Court of law or equity in England, it becomes subject, as to all matters connected with that suit, to the jurisdiction of a Court of Equity; *Rothschild v. Queen of Portugal*, 3 Y. & C. Exch. 594; *Prioleau v. United States*, L. R. 2 Eq. 659, V. C. W.; S. C., *nom.* *United States of America v. Prioleau*, 12 Jur. N. S. 724; *Duke of Brunswick v. King of Hanover*, 6 Beav. 1; S. C. 2 H. L. Cas. 1; *United States of America v. Wagner*, L. R. 2 Ch. Ap. 582; L. C. & L. JJ.; L. R. 3 Eq. 724, V. C. W.; *King of Spain v. Hullet*,

The plaintiffs in the cross-bill having put in a full and sufficient answer to the original bill, which is subsequently amended, obtain an order for a month's time to plead, answer, or demur to the amended bill after the plaintiff therein should have answered their cross-bill, that order is held good, and is accordingly affirmed.

August 19, 20.

THE material allegations and prayer of the appellant's original bill are stated in the report of a former appeal (1 Dow & Clarke, 169), brought by the respondents against an order of the then Lord Chancellor, overruling their demurrer to that bill. The House of Lords dismissed that appeal and affirmed the order of the Court below, on the 18th of June, 1828, thereby establishing the appellant's right to sue in our Courts of equity as a foreign sovereign, and in his political capacity. The respondents, on the 3d of July following, filed their cross-bill in the Court of Chancery against the appellant, and Don Justo de Machado, who had also been made defendant to the appellant's bill, but remained out of the jurisdiction.

* 334 * The cross-bill, after reciting the material parts, and the prayer of the original bill, stated and charged in circumstantial detail, that many of the allegations in respect of which the respondents were made parties to the said original bill were not according to the truth, and that the appellant had in his power, and in the power of his agents, servants, and ministers, various documents and statements, by which, if produced, it would appear that many of the allegations in said bill were not according to the truth, and by which also the truth of many other circumstances would appear, whereby it would be shown that appellant had no title to relief against these respondents in respect of any of the matters in said bill mentioned; that the appellant had no right to the fund provided by the treaties in the said original bill mentioned; and that the claims of Spanish subjects on that fund had been adjudicated in Paris, and openly, and

7 Bligh N. S. 359; 1 Dan. Ch. Pr. (4th Am. ed.) 19, 20; *Queen of Portugal v. Glyn*, 7 Cl. & Fin. 466; and a bill filed by it may be dismissed with costs. *United States of America v. McRae*, L. R. 8 Eq. 69, 77, V. C. J.; *Queen of Spain v. Parr*, 18 W. R. 110, 112, V. C. J.

with the knowledge of the appellant, sold, and by such sales became the property of French and British subjects; that his Catholic Majesty had unduly got possession of a considerable portion of the trust or indemnity fund, and misapplied it, and that he intended to apply to the general purposes of his government the money alleged in his bill to be deposited with the respondents; and that, as evidence of such intention, his Catholic Majesty and the Assembly of the Cortes, in the year 1823, enacted that the said fund should be applied to the exigencies of the executive government; and the Spanish finance minister accordingly assigned the said fund to divers persons, by drawing bills of exchange against it, whereby any right assumed by the appellant and government of Spain of further dealing with it was wholly extinguished. That by the laws of Spain, the moneys in the said original bill mentioned did not belong to his Catholic Majesty, nor was he entitled * to sue for the same; and that so it would * 335 appear, if his said Majesty would set forth the law of Spain by which he claimed to have any interest in the said moneys, or any right to sue for the same. That various despatches, communications and orders had been transmitted by the orders and with the privity of his said Catholic Majesty to the said Justo de Machado, in which it was admitted, or stated, that his Catholic Majesty had no right, or interest, or title in or to any moneys in possession of the said Justo de Machado; and that so it would appear, if all communications or despatches made or sent to the said Justo de Machado, by, or by the orders of, or with the privity of, his said Catholic Majesty, or any of his ministers or council, were set forth. That the said moneys, by certain agreements entered into by his Catholic Majesty, or with his authority, did, as against him, and all persons claiming under him, belong exclusively to certain persons having claims under a certain convention concluded in May, 1823, by which his Catholic Majesty became bound to make full compensation to all British subjects for property or vessels belonging to them, which had been detained or seized by Spanish vessels or Spanish authorities, at any time after the 4th of July, 1808, down to the date of the said convention; and in particular, that a great part of

the said moneys did belong to respondents, for that the said Spanish government seized, or caused to be seized, subsequently to the 4th of July, 1808, two ships, called the "Scorpion" and the "Vulture," with their cargoes, which belonged to these respondents; and that the same were sold by the authority of the King of Spain; and that the whole of the proceeds thereof, amounting to upwards of one million of Spanish dollars, were paid into the royal treasury, and applied to the use of his Catholic Majesty; and that these

* 386 respondents had a good and * valid claim against him, to the amount of more than 200,000*l.* which they were prevented from enforcing against him merely by his royal character.

The cross-bill further charged, that there was a special necessity that the appellant should be compelled to answer upon oath all the matters thereinbefore mentioned, inasmuch as the same were material to the respondents' defence in the original suit, and to produce all writings, papers, and documents in any way relating to any of the matters therein mentioned, which then were in the possession of him, or of any of his agents, ministers, or servants. That his Catholic Majesty had knowledge, remembrance, or belief, with respect to all or many of the matters thereinbefore mentioned, and had documents and writings, and other means of full and perfect knowledge as to the same within his power; and that he was bound to use such means, in order to give the respondents the aforesaid discovery; and that, without the production of the said documents, and the discovery of all the matters by the said cross-bill inquired after, these respondents could not have justice in the said original suit, the more especially as his said Catholic Majesty intended to amend his said original bill, and materially to alter the case stated in it, which these respondents submitted he ought not be allowed to do till he should have fully answered their said cross-bill; the discovery thereby prayed being such as, besides being essential to their defence to the original bill, would show the untruth of the allegations which the appellant intended to introduce by amendment into his said original bill.

The cross-bill then prayed, amongst other things, that the

appellant might be ordered to make to these respondents the discovery thereby sought, and that his said Catholic Majesty might also be restrained from proceeding in the said original suit until he should * have granted a full discovery of all the matters of which a discovery was thereby prayed, and of all the writings, papers, and documents therein mentioned. * 337

The respondents, in the same month of July, 1828, put in their joint and several answer to the appellant's original bill. And the appellant having amended (*a*) his bill in March, 1830, an order was made in both causes by the Vice-Chancellor, bearing date the 8th day of May, 1830, upon the application of the respondents, that they should have a month's time to plead, answer, or demur to the amended bill, after the appellant should have answered the bill of the respondents. An application made on behalf of the appellant to the then Lord Chancellor to discharge that order, was refused on the 6th day of July following.

The respondents were subsequently served with two notices of motions to be made on behalf of the appellant before the present Lord Chancellor. One, bearing date 15th January, 1831, was to the effect, "That Don Juan Escudero, residing in Weymouth Street, in the county of Middlesex, might be permitted, on behalf, and in the name of the appellant, to put in an answer to the bill of the respondents, the appellant thereby undertaking that the answer so to be put in, and all proceedings consequent upon it, should be as valid and effectual for the purposes of the said causes, in such manner as the Court should direct, as if such answer had been put in personally by the appellant in the ordinary course; or that the said Court would be pleased, under the peculiar circumstances of the case, to accept the answer of the appellant without oath or signature."

An affidavit of Don Juan Escudero, filed in support of that intended motion, stated, amongst other things, * that he was one of the appellant's subjects, and appointed by him a commissioner in this country, for the purpose of recovering from the respondents and others the indemnity funds mentioned in the pleadings: That deponent

(*a*) 1 R. & My. 7.

had perused and carefully considered the said bill filed by the respondents, purporting to be a cross-bill, and believed that the appellant had personally little or no knowledge of the matters contained therein: That, believing it would be impossible to procure an answer to the said cross-bill from the appellant personally, inasmuch as deponent conceived it would be, and as he was instructed by authority, would be considered, both by the appellant and the Spanish government, inconsistent with the rank and dignity of the appellant as a sovereign prince, to put in an answer personally and upon oath in the said Court of Chancery, or in any of the Courts or tribunals of this or any other country, he, this deponent, upon advice of counsel and after communication with the appellant, was authorized by him to put in, on behalf and in representation of the appellant, an answer to the said cross-bill, and also to consent, on the part of the appellant, that such answer, and all proceedings in the said causes consequent thereupon, should be as valid and effectual for the object and result of both the said suits, as if the appellant himself had put in the answer in the ordinary way; and that from the knowledge deponent possessed as to the several matters contained in the said cross-bill, he had no doubt whatever but that he could give a full answer and discovery as to all the matters therein contained, if he were permitted so to do by the said Court of Chancery; and that he was willing, if the said Court should think fit so to direct, to put in a full and complete answer to the said cross-bill, in the place and in the name of the appellant.

* 339 * The second notice of motion, bearing date the 10th September, 1831, was to the effect that the aforesaid order of the Vice-Chancellor, of the 8th day of May, 1830, affirmed, on appeal, by the Lord Chancellor the 6th day of July, 1830, might, with the said order of the 6th day of July, be discharged.

An affidavit of Mr. Thomas Browning, filed on the 15th of November, 1831, in aid of both motions, stated, amongst other things, that deponent was the solicitor employed in the said causes on behalf of the appellant; and that on the 30th day of August, 1831, an order was made by the Court

of Chancery, in a cause still pending, in which Juan Alvarez y Mendizabel was complainant, and the said Machado, the respondents, the appellant, and others were defendants, whereby these respondents were ordered to pay into the Bank of England, to the credit of that cause, the sum of 24,020*l.*, and to deposit certain mining shares, part of the indemnity fund or of the produce thereof, alleged in the appellant's bill to have come into the respondents' hands under the circumstances therein stated. The deponent, after setting forth in his affidavit several communications between himself and the solicitors to the said Mendizabel, as to a proposed co-operation to enforce the last-mentioned order, stated that the bill of Mendizabel was dismissed as against Messrs. Hullet and Widder without previous intimation to deponent: that, in consequence of such dismissal, the said order of the 30th day of August had not been in any manner acted upon: and that deponent had good reasons for believing that the said Mendizabel had been induced to dismiss his bill as against the respondents, either in consequence of some bribe given or promised to him by the respondents for that purpose, or in consequence of some fraudulent *concert, com- * 340 promise, or agreement subsisting between the said Mendizabel and the respondents.

The respondents excepted to this last affidavit for impertinence, and their exceptions being referred to the Master, he certified that the whole of that affidavit was impertinent. The Master's report was subsequently confirmed by two orders made by the Lord Chancellor, one bearing date the 15th of March, 1832, referring back to the Master, to expunge the said impertinence from the affidavit; the second, bearing date on the 14th of May following, disallowing exceptions filed by the appellant against the report.

By another order of the same 14th of May, 1832, his Lordship, having previously heard the two motions, of which the notices are above stated, was pleased to declare that he did not think fit to make any order upon them.

The King of Spain now, by his appeal to this House, prayed for the reversal of all these orders, viz., the order of the Vice-Chancellor of the 8th of May, 1830, the order of the

then Lord Chancellor of the 6th of July, 1830, affirming the same, and the said three orders of the present Lord Chancellor of the 15th of March and 14th of May, 1832.

The Attorney-General and *Sir C. Wetherell*, in support of the appeal. — This is a case of first impression. This is the first time a foreign potentate has been called upon as a defendant to put in an answer upon oath. None of the Judges before whom this case came, none of the counsel who argued it on either side in the Court below, or who argue it now here, have been able to find one precedent. The respondents have already questioned, by their demurrer, the

* 341 right of the appellant to sue as a foreign * sovereign in our Court of Chancery. But your Lordships decided against them, and by that decision it is now established, that a foreign sovereign may sue on behalf of his subjects in our Courts, and is entitled to be considered as a sovereign prince to all intents and purposes; (a) the individual is merged in the sovereign, and he cannot be called on to put in an answer upon oath as a natural person. By that decision upon the demurrer it was declared that the King of Spain was entitled to an answer to his bill from these respondents. The respondents, baffled in their first manoeuvre, next filed a cross-bill, before they put in an answer to the original bill, with a view, that, knowing their answer would render it necessary for the original bill to be amended, they might have an answer to their cross-bill before they answered the amended bill. The order of the Vice-Chancellor, that now first appealed from, was what they anticipated; that order is wrong. For, in the first place, this is not a cross-bill, according to the definition of a cross-bill as generally understood, or according to the real principle upon which alone a Court of Equity allows the right to file a cross-bill, namely, that the defendant to an original bill may have an answer on oath to his cross-bill, in order to enable him to make out a complete defence to the original bill. This House decided that the original bill was the bill of the King of Spain, as King. But the bill of the respondents is

(a) 1 Dow & C. 179.

not against the King of Spain, but against "a certain individual claiming the appellation and title of his Catholic Majesty, Ferdinand the 7th, residing at the palace of the Escorial, near Madrid," &c. A cross-bill should be filed against the same plaintiff who sued by the original bill —

* LORD WYNFORD. — Has he demurred to the cross- * 342 bill ?

LORD PLUNKETT. — The proper way to try that question would be by demurrer.

Counsel for the appellant. — We feel a difficulty on that point. We are now showing that this is not a cross-bill ; but if your Lordships decide against us on that point, then our difficulties will be multiplied. There may be a good defence to a cross-bill, without demurring. If we demurred, we should thereby have admitted the allegations of facts in the cross-bill, which we do not admit, and therefore we could not demur ; for there is no ground for the allegation therein made, that the King of Spain is misdealing with the indemnity funds. The practical purpose of a cross-bill is admitted by all the authorities on the subject, to be for protecting a defendant from any unjust claim, and many cases may be put, in which a defendant could not put in a complete answer to the original bill, essential to his defence, until he had first obtained an answer to the cross-bill filed by himself. The respondents' bill is not for that purpose ; we call their cross-bill a mockery : it charges that British subjects, and, among them, the defendants, had claims on Spain for piratical attacks on the "Scorpion" and "Vulture" ships, in 1808. This is an imposition on the Court of Chancery. Compensation has been already made for such claims by a convention with Spain. If your Lordships decide this to be a cross-bill, we must submit ; but we rely on this part of the case for the appellant, and entreat your Lordships to look at the whole of the record before you come to that decision, which may be of dangerous consequence, inasmuch as fraudulent parties may hereafter take advantage * of the form. With respect to * 343

the rule of practice in the Court of Chancery, namely, that the identical plaintiff in the original bill must himself swear to his answer to a cross-bill, we maintain that that is not a universal nor an inflexible rule. The Court of Chancery dispenses with it in the cases of peers, corporations, infants, lunatics, married women, and other persons in the like situations, and these cases furnish an analogy important to be kept in view in the present case. Granting the existence of the rule, we say there is nothing in the generality of the practice, nor in the special nature of this case, to require the application of it here. Why is exception made in case of a peer? It is because he is a hereditary legislator, and it is part of our municipal policy to accept his word of honour instead of his oath. Will your Lordships require of the King of Spain, suing here on behalf of his subjects, to do that which you dispense with in a petty baron of twenty-four hours' creation, in a simple controversy with one of his fellow-subjects? A peer can, and does, take an oath in some cases, but the Court of Chancery dispenses with his oath in an answer to a cross-bill. Why cannot this House institute a like rule in the case of a king? In cross-bills against corporations, the town-clerk swears to the answer for them —

THE LORD CHANCELLOR. — Both Lord REDESDALE and Lord LYNTHURST, in their judgment on the demurrer, said, that the King of Spain was on the same footing here as his adversary, when he came to sue here, and the Court of Chancery had complete control over him. (a)

The Counsel for the appellant. — Those learned Lords said nothing in the course of the argument, or in the judgment on the demurrer, as to the King of Spain * being obliged to put in an answer on oath. The Court of Chancery did not require an oath from Quakers, Moravians, or Hindoos. (b)

(a) 1 Dow & C. 174.

(b) In the several parts of this case in which Quakers are mentioned, their partial exemption from the necessity of taking an oath is spoken of as an exemption from the obligation of making a solemn appeal to God in

* LORD CHANCELLOR. — Yes ; in their cases an oath is * 345 required, in their own form ; and the question always was, what was the ceremonial that amounted to an oath ? Here the King of Spain declines an oath, or a ceremonial equivalent to it.

LORDS WYNFORD and PLUNKETT. — Where is it laid down that a sovereign cannot take an oath ? It is another case, whether he can be compelled to take it.

THE LORD CHANCELLOR. — A sovereign can take an oath ; our's takes his coronation oath.

affirmance of their statement ; this seems to be a mistake. In the case of *Atcheson v. Everett*, Lord MANSFIELD says (Cowp. 890) : " It is objected that the Quakers are the only people in the world who ever refused to swear ; but in substance their affirmation is the same thing, the form only is different, for an affirmation is a most solemn appeal and attestation to God of the truth." The Act of the last session (3 & 4 W. 4, c. 49), which allows Quakers and Moravians to make an affirmation on all occasions where an oath would be required from other persons, may therefore be said to have done no more than put them on an equality with other men.

The subject may be truly considered in this point of view : Quakers believe that any use of the name of God in merely human transactions is impious, and it is in itself a sin. Other men do not think the solemn use of that name is a sin, unless it be so used to sanctify a falsehood. To compel Quakers, therefore, to take an oath (if they could be compelled), would be to oblige them, in their opinion, to offer a gratuitous offence to God, since they were ready to authenticate in another, but still in a very solemn manner, the truth of their statements. The legislature have wisely ceased to insist upon a form which in many cases prevented Quakers from performing their duties towards their fellow-subjects by the fear that in doing so they should be violating their duty towards God.

The case of the Hindoo is also incorrectly put in the argument. His mode of verifying a statement not only is, but has been treated in our Courts as an oath (1 Atk. 21-50 ; Str. 1104 ; 1 Wils. 84). It is a solemn invocation of the Deity, though not made in the English form. Such invocations have always been admissible in our Courts, for, as Lord MANSFIELD, in *Atcheson v. Everett*, Cowp. 809, said, by the principles of the common law, no particular form of oath was required, but that every man was allowed to swear in that form which he thought most binding on his conscience. With respect to all the persons, therefore, the answer of the Lord Chancellor was in conformity with the leading authorities, " in their cases an oath is required in their own form."

Counsel for the appellant. — But he does not take an oath in cases of controversy in our Courts, nor in matters external to his kingdom. It is impossible for the appellant to do so consistently with his independent sovereign character, according to the principles of the law of nations, as practised between all European states, and his admitted relation to this country as head of the kingdom of Spain. The appellant tenders an equivalent, as a corporation does.

An infant cannot put in an answer ; it is put in for him. So with a lunatic, who answers by his committee ; so with a married woman, who answers by another. All these rules are of the creation of the Court of Chancery, which, even in the case of a person who was not a lunatic, controlled its own practice, and appointed a person to put in an answer for him. The case of corporations is the most analogous to the present case, which is new, and in which therefore this House can lay down a rule of practice.

But it is impossible, after examining the history and circumstances of this case, and the position in which the * 346 respondents are placed, to contend that an answer * from the King of Spain, upon oath, to the respondents' bill, is in any degree whatsoever necessary, in order to give them the means and opportunity of defence.

LORD CHANCELLOR. — You are not to assume that the King of Spain has no knowledge of the matters, of which a discovery is sought by the bill ; suppose he has something *in græmio*, which no one else can disclose.

Counsel for the appellant. — Our impression is, that he cannot take an oath ; the law of nations will not allow the independence of a sovereign to be lost by taking such oath. The appellant is ready to comply with all the forms of an answer, except the oath. Being allowed to file a bill as a sovereign prince, and in a public character, as trustee for his subjects, he ought not and cannot now sink the sovereign in the individual, and put in an answer on oath to what the respondents call a cross-bill. There is no instance of a foreign sovereign being made a defendant to a cross-bill, and therefore the

Court of Chancery or this House is free to lay down the rule for the first time, being quite unfettered by practice, by law, or by Act of Parliament. A corporation supplies an officer who can put in an answer upon oath; appellant is ready to do the same. He tenders M. Escudero, or any other officer, on his behalf that the Court of Chancery pleases to call for. The King of Spain is a foreign corporation, and offers an individual who is within the jurisdiction, who is competent to give all the requisite information, and who can be dealt with in every way as liable to all the consequences. He states by his affidavit that he has more knowledge of these matters than the appellant can have.

* THE LORD CHANCELLOR. — Have you any case in * 347 which a sole corporation is allowed to put in an answer to a cross-bill without oath?

Counsel for the appellant. — We have not. The King of Spain was allowed to sue as a sovereign: but now, if your Lordships say he must swear to an answer, you batter down the right which you raised, and you nullify the judgment which you formerly gave, for he cannot swear to the answer, were the sum in dispute as many millions as it is thousands. If the practical rule to be laid down in the Court of Chancery is, that an accountable agent, trustee, or party resident in England shall not be compelled to answer until the foreign sovereign, who has appointed him, has answered upon oath what may be ordinarily called a cross-bill (however useless and unnecessary for the purposes of his defence), the Court of Chancery would in effect be shut against a foreign prince, and the grossest frauds may be practised against him with impunity, by his own, or the accountable agents or parties resident in this kingdom, and within the jurisdiction of this Court.

Sir Edward Sugden and Mr. James Russell, for the respondents. — The appellant has no right to complain that he is kept to the practice of the Court. It was by very sharp practice he obtained the order to amend his bill. That order was first discharged for irregularity, but the respondents'

clerk in Court had incautiously accepted the 20s. costs for the amendment, and the appellant, discovering that it was then recently decided that such acceptance was held a waiver of the irregularity, again moved the Vice-Chancellor, who, feeling himself tied down by the order of the Lord

* 348 Chancellor * in *Tarleton v. Dyer* (a) restored the order. That is not, however, now the subject of dispute. The first of the orders here appealed from is according to the practice of the Court of Chancery, which is, that if a man files a bill and after answer amends it, and the defendant to it files a cross-bill in the mean time, the plaintiff is bound to answer that cross-bill, before he can compel an answer to his amended bill; and the liability to answer his amended bill depends upon his answering the cross-bill. This order is to that effect, and it has been twice confirmed, first by Lord LYNDHURST and again by the present Lord Chancellor.

But it is asserted for the appellant that this is not a cross-bill, because the appellant is described as a certain individual claiming and using the title of "His Catholic Majesty, Ferdinand the 7th, King of Spain, residing at the palace of the Escorial." Why, the appellant's own bill describes him so. All that is required for the cross-bill is, that he is described by his higher title, to entitle us to ask of him to do the same justice to us which he asks for himself. The rule of practice is laid down in *Calvin's Case*. (b) If the appellant was not described by his higher title, he might demur or plead. There is no authority to show that a foreign sovereign sues in any other way than as an individual; only he must have his higher name. But if this be not a cross-bill, why did they not demur, as one of your Lordships observed? We cannot now go into the question, whether this is or is not a cross-bill, or whether we can support the allegations contained in it, or have good grounds of defence to this suit. When the cause comes to be heard on the merits, our clients will absolve themselves before the Court.

* 349 * The chief question here is, whether the King of Spain can take an oath? What prevents him?

(a) 1 R. & My. 1-7.

(b) 7 Co. Rep. 30.

Because the King of England cannot take an oath to matters in our Courts, so, it is argued, cannot the King of Spain. But he is to take an oath, if he puts himself into that state in which an oath is required. The counsel for the appellant say, that the law of nations forbids it, and they offer a representative for his Majesty, to swear to the answer. But our Courts require the oath of the individual who answers. In the case of *The Columbian Government v. Rothschild*, (a) the like difficulty arose; the plaintiffs there were described as the "Columbian Government," and their counsel being desired to show who they were, and not being able to do so, the demurrer to the bill was allowed, on the principle that the plaintiff must describe himself so that the defendant might come against him by a bill or cross-bill. The King of Spain is bound by the same rule that binds others; there is no distinction between suitors. If he came here for justice, what is there to entitle him to an exemption from the rules of justice? The cases of infants or married women have nothing to do with this case. As to corporations aggregate, the officer who has the care of the corporation's documents is to give the information called for, and the practice is, to make him a party to the bill with the corporation; but the King of Spain is not within that class of cases. One of your Lordships asked if there was any instance of a corporation sole being exempted from the general rule of practice? No answer was given because no instance of the sort could be found. The King of Spain tried to maintain a suit by his agent; he failed; can he defend a suit by his agent? He is bound to *defend as other suitors do, and the * 350 law of England recognizes no difference of rank amongst them. The law of nations lays down a doctrine to the same effect, where it says that "the promises, the conventions, all the private contracts of the sovereign are naturally subject to the same rules as those of private persons." (b) But the dignity of the King of Spain, it is said, prevents him from taking an oath. He may have such dignity and rank in Spain; but when he leaves his own

(a) 1 Sim. 94.

(b) Vattel, b. 2, c. 14, § 213, and p. 209, of edit. 1793.

kingdom and comes for justice into this, his pre-eminences do not accompany him. There is nothing more inconsistent with royal rank than to be sued at all; but if a king be sued, he must act like any other individual. The law is so laid down in *Calvin's Case*, before referred to. *The Columbian Government v. Rothschild* is a decision quite in point, and that decision was sanctioned by Lords ELDON and REDESDALE.

As to the orders confirming the Master's report on Mr. Browning's affidavit, although the counsel for the appellant seems to have abandoned that part of the appeal, we confidently submit that these orders also were right, and that the affidavit was wholly impertinent, being obviously filed in the hopes of exciting a prejudice against the respondents, by introducing, in the form of a statement upon oath, the conjectures of the appellant's solicitor as to matters irrelevant to this cause. We submit, therefore, that all the orders appealed from are just in principle, and are in conformity with the established law and practice of the Court of Chancery.

THE LORD CHANCELLOR.—What prevents the King of Spain from transferring his interest in the subject-matter of the suit to a person who can put in an answer on oath?

* 351 * *Mr. Russell*.—Nothing; his assignee might then file his bill against the respondents, and make the assignor a party defendant, which would certainly place the respondents in some difficulty.

The Attorney-General, in reply.—The appellant did not assign his rights, because he could not foresee that this objection would be raised; nor could he properly assign these funds, in consequence of the convention and arrangements with the government of France, to appoint commissioners in Spain for the distribution of them. The decision in the case of *The Columbian Government v. Rothschild* is not in point; for that was given on the ground that no such government was known in this country at the time of the contract there mentioned, and the Judge could not acknowledge in our

Courts a government which was not recognized by the government of our own country.

Mr. Russell denied that that was the ground of the decision of the Vice-Chancellor.

THE ATTORNEY-GENERAL. — We took that view of the case. This is the time to try whether this is a cross-bill, and not at the hearing on the merits; can this be a cross-bill which states as a set-off to our demand the capture of the “Scorpion” and “Vulture?”

LORD PLUNKETT. — Suppose the cross-bill ever so absurd, is that a reason for not answering it on oath?

ATTORNEY-GENERAL. — It is not a cross-bill, and if it is not, there is an end to the argument. But if it is a cross-bill, then we say, do not compel us to answer on oath, for that will be mockery, as by our original bill we * were * 352 allowed to sue as sovereign prince, and your Lordships cannot now strip the appellant of that character. This is like the case of a bishop suing in right of his see, and the difference between a bishop suing in that right and in his private right is the same as that between the King of Spain and Ferdinand Bourbon in this Court.

THE LORD CHANCELLOR. — Is there any instance to show that *ex comitate* in any Court, in this or any other country, a party shall import with him the modes of proceeding in the Courts of a foreign country? In the Court of Common Pleas a foreign prince was so far recognized as to be discharged from arrest, on giving common bail, by Mr. Justice HEATH, and Lord ELLENBOROUGH afterwards said he thought that was wrong. That went to the very verge of privilege, but yet not so far as the appellant asks us to go. Suppose a subject of Spain is suitor in our Courts, and says he does not like his cause to be tried by a jury upon oral testimony, &c.; can he claim the course of trial of his own country? Is it not the

fair course to submit to the laws of the country where he sues?

THE ATTORNEY-GENERAL. — The rules of the Court of Chancery are of its own creation, and the question is, whether in this case of novelty and difficulty it may not dispense with an oath. It is a moral impossibility that the King of Spain can answer on oath before a commissioner from our Court of Chancery, in the face of his subjects; that would be stripping himself of his sovereignty, as it would be acknowledging a superior. It would be also unreasonable, as your Lordships allowed him to sue as a foreign prince. We have not abandoned our objections to any of the orders appealed * 358 from, but * we submit that the affidavit of Mr. Browning was material, and pertinent to the motion in support of which it was made; and that therefore the orders upon that, as well as the other orders, ought to be reversed, and the appellant allowed to prosecute his suit, and the respondents compelled to put in their answer to his amended bill. We again repeat, on behalf of the appellant, the offer made in the Court below, by which he conceives that he submits to every rule of justice required by the doctrines and jurisdiction of the Court of Chancery in his case.

LORD PLUNKETT. — My Lords, it is not my intention to go into the reasons upon which I found my opinion that the orders appealed from in this case ought to be affirmed; that I will leave to my noble and learned friend, with whom I agree, and who will state the grounds of his opinion. I now move that the orders appealed from be affirmed.

THE LORD CHANCELLOR. — My Lords, I do not see any occasion for postponing the consideration of the judgment to which I think your Lordships ought to come in this case. The more I see of it, the more I am inclined to affirm the orders of the Courts below. I took occasion, during the argument at the bar, to throw out my opinion, that though the King of Spain sues here as a sovereign prince, and is justly allowed so to sue, yet, beyond that, he brings with

him no privileges that can displace the practice as applying to other suitors in our Courts. The practice of the Court is part of the law of the Court; if any instance could be adduced in which the Court deviated from the general practice, or by which the Court was divested of the power of applying the universal rule, I should concede to that, and it would assist me in *giving the plaintiff relief. Your Lord- *354 ships' decision upon the demurrer did not dispose of this point; but it is clear to my mind, that if the present question had been then mooted before your Lordships, it would have been disposed of in the same way. One of the grounds of Lord LYNDHURST's decision is, that the appellant should be on the same footing with his adversary, subject to the control of the Court, and liable to the rules of practice. It was impossible to read the judgment in the case of *The Columbian Government* against *Rothschild*, without seeing that the present Master of the Rolls, in giving that judgment, proceeded on the same view of the matter. The noble and learned Lord who assisted yesterday at the argument, authorized me to say that he concurred in the decision of the Court below. The reluctance which the Court below had in coming to that decision was, that there was an appearance of an advantage being taken by one party. But it would be improper to state that in this stage of the proceedings. I concur in the proposition of my noble and learned friend.

The question was then put, and the orders of the Courts below affirmed with costs.

TAYLOR v. FAIRLIE.

1833.

WILLIAM TAYLOR	<i>Appellant.</i>
Sir WILLIAM CUNINGHAM FAIRLIE, Bart., and	} <i>Respondents.</i>
others, Trustees for his Creditors . . .	

Bankrupt. Caution for Expenses.

A bankrupt is made defender to an action with the trustee under the sequestration, and a decree is pronounced against him in his absence. He is afterwards allowed to come in without the trustee and lodge defences to the action; after which the pursuers apply and obtain from the Court an order, that he gives security for the expenses of process before he shall be further heard: *held*, that the order, in that advanced stage of the proceedings, is not well founded, and it is accordingly reversed.

February 11, 14.

SIR WILLIAM CUNINGHAM FAIRLIE, by tack or lease, dated August, 1812, let to the appellant and his two brothers, John and George Taylor, and their heirs, but secluding assignees and sub-tenants, under whatever denomination, legal or voluntary, without the concurrence of the said Sir W. C. Fairlie, in writing, all the coal in the estate of Fairlie, with certain reservations and powers as to working, for twenty-four years, and during the life-time of the said George Taylor, if he should survive that period, at a rent of 500*l.* a year after the first year, payable by equal quarterly payments. It was provided, that on failure of the regular quarterly payment of the rent, so as that two quarters should be at any time due when a third became current, the tack should be void, without

* 856 any process of declarator for that effect, * and it should be in the power of Sir W. C. Fairlie, his heirs and successors, to enter and dispose of the premises, as if the said tack had never been made.

The lessees entered into possession, and worked the colliery until the year 1814, when John and George Taylor assigned their interest to the appellant, who, falling into embarrassments in the year 1816, assigned the lease with other subjects, to Messrs. Fulton and Neilson, in trust for the benefit of his creditors. The landlord did not assent to nor recognize either of these assignments. The trustees withdrew from the colliery in 1818, upon which John and George Taylor, during the appellant's absence from Scotland, petitioned the sheriff of Ayrshire, in which county the colliery was situated, to be put in possession of the same, and they were accordingly admitted. The appellant, on his return to Scotland, applied to the sheriff for possession of the colliery, and called before him, as parties, both the brothers and the landlord, who appeared and resisted the application. The further litigation was then suspended, in consequence of the bankruptcy and sequestration of the estate and effects of the appellant, in 1819; and Mr. Kerr, appointed trustee under that sequestration, which still continued, did not take any steps in respect of this subject. (a) John Taylor died in 1823, and George Taylor became involved in difficulties. The respondent, Sir W. C. Fairlie, having also become embarrassed in the same year, executed a trust conveyance of his estates to the other respondents, for the benefit of his creditors.

On the 10th of March, 1825, the respondents raised *summons of declarator of irritancy against George * 357 Taylor. John Taylor, jun., heir of the former lessee, and his curators (he being a minor), the appellant and his trustees, Messrs. Neilson and Fulton, and Mr. Kerr, narrating the contract between Sir Wm. C. Fairlie and the lessees, the failure to pay the rent at the stipulated terms, and that, "besides former rents, there was due at the term of Martinmas, 1824, on account of the said colliery, rent for four quarters, whereby the irritancy declared in the aforesaid tack had been incurred, and the said tack had become void and extinct."

(a) The appellant presented a second petition to the sheriff in 1825, praying possession, which was resisted by the landlord, and refused by the sheriff, whose judgment was adhered to by the Court and affirmed on appeal to the House of Lords in 1826.

And thereon it concluded, that it "should be found that the foresaid rents were due, at least that there were owing and resting due to the pursuers two quarterly payments of the foresaid yearly rent, while a third had become current; and that the said defenders have thereby contravened the terms of the said tack, and incurred the irritancy aforesaid;" and that they should be decerned to remove from the occupation of the subject. Defences were lodged for Messrs. Neilson, Fulton, and Kerr, objecting to any decree going out against them personally, for rents due from the colliery, on the ground that they had nothing to do with the subject during the time for which the rents mentioned in the premises had fallen due, but stating no objection to the declaratory conclusions of the summons, or the consequent conclusion for removing. No defences were at first lodged for the appellant. The Lord Ordinary assoilzied Neilson, Fulton, and Kerr from any claim for the rent, and found them entitled to their expenses, *quoad ultra*, decerned in the terms of the libel.

The appellant having afterwards represented against that interlocutor, was allowed, upon paying two guineas of expenses to the respondents, to lodge defences. A record

* 358 was made up, and a debate took place, when the * Lord

Ordinary, by an interlocutor, of the date of the 18th December, 1827, decerned against the appellant in the terms of the libel, finding him liable to the respondents in expenses. A reclaiming note having been presented against this interlocutor, the case came on for advising, before the Second Division of the Court, when the appellant insisted, among other things, that on a balancing of accounts between himself and his co-lessees, and the landlord, it would be found that the rent and arrears libelled for were not due when the summons was brought. The respondents objected to any investigation of the accounts then, contending that such investigation, if necessary, should have been offered while the case was in the Outer House; they urged, that the appellant, being a sequestrated bankrupt, and having obtained no retrocession from his trustee, should not be allowed to litigate further in this matter, without his finding caution for the expenses of process. The Lords of the Second Division, after

advising on the further pleadings, by an interlocutor of the date of the 4th December, 1829, ordained the appellant, before further proceedings, to find sufficient caution for the whole expenses of process. A petition for leave to appeal against that interlocutor was afterwards presented by the appellant, but refused; and, he having still failed to find caution, the Court, having heard counsel for the respondents in respect of no appearance for the appellant, and of the former procedure, refused the desire of the reclaiming note, and adhered to the interlocutor submitted to review.

From these interlocutors an appeal was lodged before this House, but the point, to which the arguments at the bar and the judgment of the House chiefly applied, was the order on the appellant to find caution for the expenses of process before he should be further heard.

* *The Lord Advocate* and *Dr. Lushington*, for the * 359 appellant. — This is the first time that a defender is called upon to find caution for the costs of the pursuer. There is no rule in law which renders it necessary for a party called as defender to find such caution, although he may have been rendered bankrupt previous to the institution of the action; if any such rule did exist in ordinary cases, it would be inapplicable in the present. The privilege of defending rights in a court of law is one of paramount value and importance. The defender must, in ordinary cases, be entitled to defend effectually; and though one may have suffered the misfortune of bankruptcy, he is not to be held as *ipso facto* excluded from the right. The principle is the same as to whether the defender is prohibited absolutely from stating his defence, or has such conditions attached to the exercise of his right as render it difficult or impossible. In the case of a bankrupt it is very nearly the same, whether he shall be prohibited absolutely or prohibited indirectly by being subjected to the necessity of finding security for expenses, as a bankrupt cannot, in almost any case, be expected to obtain solvent securities. So serious and severe a disability cannot be presumed; and its existence as an established principle of law must be shown before it can be permitted to operate to the disad-

vantage of parties. But the slightest inquiry proves that this disability is not imposed by statute nor by common law, nor is it recommended by any principle of expediency. By statute various restraints are laid upon bankrupts, or persons who are in a state of insolvency; but in no statute is there to be found any thing which, directly or remotely, encroaches upon their right of effectually defending themselves in proceedings directed against their persons, or against those rights which

the sequestration has left in their persons; neither can
 * 360 we * discover any rule in common law by which any such disability is established, and the principles of justice are directly opposed to the existence of such disability.

The operation of the principle which the respondents assert precludes all investigation into the merits of the claim preferred in an action; for before defences are received, the pursuer must, according to their principle, be held entitled to crave that an order for finding security should be issued; and in default of its being obeyed, that the defences should not be received, far less considered. The absurd conclusion to which this principle leads proves its unsoundness. If a bankrupt defender is not to be listened to in stating defences to any action brought against him, he must be at the mercy of any one who drags him into Court, as to no action instituted against him, on grounds however frivolous, can he state available objections, and the party pursuer must be successful in obtaining decree; and as decrees are followed by the diligence of the law, the personal liberty of the subject is thus indirectly compromised through the forms of law. There are many cases in which parties are compelled to litigate with adversaries who are in no condition to pay expenses if unsuccessful; the successful party has it always in his power to do diligence for the recovery of those expenses, and he may proceed to the incarceration of his opponent, if payment shall not be made. But there was no example, until this case was decided, in which any other than the ordinary penalties attending rash litigations were attached to bankrupt defenders. The practice of the Court has, indeed, rendered it imperative on bankrupt pursuers to find security for expenses of actions, instituted for the purpose of making effectual

claims, which, having been transferred by the sequestration to trustees, are given up by the trustees to them. The reason is, first, because if such actions were * favoured, * 361 trustees would, in doubtful cases, make deceptive assignments to the bankrupt, on mutual understanding, and subject the parties, against whom the claim lay, to the necessity of contesting with an insolvent; and secondly, since the trustee must make available for creditors all the rights vested in the bankrupt, and cannot, consistently with his duty to them, part with any right of value, there is a plain and strong presumption against the validity of the claim. But the right which is attempted to be cut down in this case, was all along in the person of the appellant, and never vested in the trustee, and the appellant is not suing for the establishment of any claim, but maintaining his right of possession against a claim preferred against himself. The lease was granted to the appellant and his brothers, on condition that assignees and sub-tenants, legal or voluntary, without consent of the landlord, should be excluded. The trustee was never recognized by the landlord; the assignment was null, in so far as it attempted to convey any right to the lease; and accordingly the trustee gave up possession, only because he had no right to maintain it. The right was personal and intransmissible. There is no reason here for any imputation of fraud or arrangement, in relation to the trustee's abandonment, as his surrender confessedly does not arise from any inclination of his, but from his inability to get the right effectually vested in his own person. In the case of *Barry v. Geddes* (a), the slender presumption in favour of a bankrupt pursuer, arising from his having succeeded in persuading the agents for the poor that he had *probabilis causa*, was held to have justified the Court in departing from the requirement of caution. The present case is stronger, for the right was never in the trustee, and the appellant is defender. The principle acted upon by the * Court of Session in this case is pregnant * 362 with consequences extensively injurious, and in contradiction with the actual practice of the Court. It has been expressly found, in the case of *Clerk v. Ewing* (b), that a

(a) 5 Shaw & D. 727.

(b) May 20th, 1818, Fac. Coll.

bankrupt has a title to appear and resist an attempted encroachment, through the forms of law, on his personal liberty. In like manner, it cannot be doubted that a bankrupt is permitted, without restriction, to defend his *status*. He can, for example, defend in a declarator for bastardy, or even pursue one. If these points may be considered as fixed in practice, what line of distinction can be drawn between those cases and others in which the fate of rights, strictly personal and intransmissible, is to be determined. The respondents, in any view of the law, as affecting the right of pursuers to obtain security for expenses, were barred by their own acts from pleading that right in the circumstances of this case. A plea that the appellant was not entitled to be heard upon the merits of the cause without finding security, if good at all, should be stated *in limine*. It was a plea that went to deprive the appellant of a right to appear, or at least to attach severe conditions to such appearance. Nothing has been more settled in the law than that a defender, by stating defences upon the merits of the case, virtually abandons all the dilatory defences which might have been competently pleaded by him. No one can be allowed in equity to lead his adversary into the expenses of litigation, which would have been stopped at the outset by a statement of the proper defence (a). The principle applies equally in the case of a pursuer, who joins issue with the party whom he calls as defender, upon the merits.

The respondents in this case did not, at the first calling * 363 of the cause, demand security for costs; * they took an order for a condescence, revised it, consented to close the record, debated on the closed record before the Lord Ordinary, and debated again before the Inner House; but at no stage of these proceedings did they except to the title of the defender, or make that demand for security which they subsequently preferred. It was only after issue had been joined on the merits, after a great expense had been incurred, that the plea was resorted to.

Sir C. Wetherell and *Mr. Wilson*, for the respondents.—
The appellant, being a bankrupt under sequestration and

(a) *Ersk. b. 4, tit. 1, § 67.*

defending the action, not only without the concurrence of his trustee, but after decree of irritancy obtained against the trustee, and after decree has been pronounced against himself on a closed record, and now craving a new investigation, cannot be allowed to be further heard, without finding caution for expenses of process. The appointment on him to find such caution is consistent with the practice of the Court and the equity of the case. Where a sequestrated bankrupt attempts to pursue an action in which his trustee refuses to concur, it may be said that his residuary interest in the trust funds gives him a sufficient title; but as it would be unjust to compel a party to litigate with him who had no means of paying the expenses, the rule has been in such cases to compel the bankrupt pursuer to find caution for expenses; and on finding such caution there is no bar to his action. (a) The same rule applies to the case of a bankrupt defender under sequestration. The sequestration vests the trustee directly with the effects of the bankrupt, and gives him the immediate interest to defend the estate. The bankrupt

* has a reversionary interest in the funds, which * 364 renders it sometimes proper that he should also be called in an action directed against the trustee, and also gives him, under certain conditions, a right to take up the case abandoned by the trustee. If the trustee had litigated, the pursuer would have had the security of the funds in the sequestration; but if he declines, and a party sists himself who is divested of all his funds, security for expenses must be found by him, as a necessary preliminary to his being allowed to plead. (b) But it is said there is a circumstance that takes this case out of the general rule. That the right to the lease, which was by the contract declared not to be assignable, could not pass to the trustee under the sequestration, but still remains a subject vested in the person of William Taylor, and therefore it is inferred that William Taylor ought to be allowed to defend exactly as if he had not been sequestrated at all. This supposed distinction is without foundation. The appellant was vested with a right

(a) 2 Bell's Commentaries, 401.

(b) Lyall v. Mudie, 8 Shaw & D. 153.

to the lease of the colliery of Fairlie, and had the power of conveying it, subject only to the risk of the conveyance being objected to and voidable by the landlord. The conveyance was not objected to by the landlord, but, on the contrary, the effect of the judicial assignation of it was admitted by him, by his calling the trustee into the suit. The circumstance that the bankrupt was called in the declarator of irritancy as well as the trustee, can make no difference. He was called only for his interest, if he had any. If he had none; if the divestiture in favour of the trustee was complete; no right was conferred on the appellant of new by merely making him a party to the action. Being made a party to the action, he was bound to sue out diligence;

* 365 instead * of which, he let judgment go against him.

It is law in Scotland that a party litigating with a bankrupt defender has a right to put him under conditions before he goes before a jury; and it is upon that principle that the Court below acted, in calling upon this appellant for security for costs.

THE LORD CHANCELLOR. — Sir Charles Wetherell, why was not this objection taken before the Lord Ordinary made the interlocutor, admitting the appellant to lodge defences?

SIR CHARLES WETHERELL. — If I had been in the Court below, I would have made the objection there in the first instance; but although we waived it there, we are not bound not to take it now. This summons of declarator was not perhaps necessary at all to secure to the respondents the possession of the colliery, but it was resorted to *ex majori cautela*, and William Taylor might be properly left out of it altogether as a defender. I know of no rule in the Scotch or English Courts by which the Court may not, under circumstances, call on the defender to give security for costs.

THE LORD CHANCELLOR. — I recognize that position as to a plaintiff, but the question here respects a defendant. You, in his absence, get a decree against him, and he, on appearing and paying two guineas to the plaintiffs, is allowed to come

in to contest that decree. Do you know of any case, in law or in equity, in which a bankrupt, or person in circumstances of insolvency, was compelled to find security for costs, he being compelled to be a party to the suit?

SIR CHARLES WETHERELL. — I ask my Lord Advocate for * any case in which a bankrupt was allowed * 366 to sue without giving such security?

THE LORD ADVOCATE. — The only time to raise this question was when the appellant first claimed to be let in.

THE LORD CHANCELLOR. — But here you, the plaintiff in the Court below, say to this defendant, Come you in to defend or not? If you do not come in, a decree shall be made against you; if you do come in, you must give me security for all my costs. Is there any decided case to that effect?

SIR C. WETHERELL. — The defendant was an unnecessary party to the suit. He came in to litigate a new point after decree against him. If a bankrupt be made a party to a bill, together with his assignees, the Court will not allow a point to be raised in his favour after the assignees have abandoned the contest, without his giving security for the costs. It is an indulgence to permit a *cestui que trust* to litigate a point which his trustees did not. This is a decree of irritancy of a lease for non-payment of rent, and we would grant indulgence upon terms. It is said that we are now precluded from requiring this caution, because the order of the Court below let the appellant in to litigate after decree, and without requiring caution. No Court can give up its own discretion, nor can it, because it has made an order *incuria*, be prevented from requiring, in the progress of the suit, what it ought to have done *in limine*. Is the Court, because it consented in mercy to hear the party, compelled afterwards to continue the hearing? The first proposition is, that the Court below was bound, in the first instance, to order security for costs. We * answer, if the Court had refused that in the * 367 beginning, and an appeal was brought here, your

Lordships would not allow this gentleman to raise a question, which all the other parties gave up, without giving the security. The second proposition is, that we have given up our right to the security, because we did not at first require it. We say, the Court, by its first indulgence, has not given up all future right to security for the costs.

LORD WYNFORD. — It strikes me that the Court below was not in a condition satisfactory to itself to give judgment in the matter, and therefore let in the appellant to give explanation. The appellant was not deprived of all interest in the lease by the appeal decided against him in this House in 1826.

Judgment. February 14.

The Lord Chancellor moved the judgment. — This case came before your Lordships upon points of practice. Three persons were made defendants to an action, as trustees of William Taylor. He was represented by his trustees, and he was himself made a defender by the election of the pursuers. When the defences for the co-defenders were lodged, it was found that they had no interest in the subject in dispute, and the Lord Ordinary, after considering the cause, pronounced an interlocutor, by which he assoilzied the trustees from any claim for the rent of the year 1824, finding them entitled to their expenses. Now let us consider in what situation this interlocutor left William Taylor, who was made defender, be it recollected, by the pursuers themselves. There was a judgment, giving the other defenders their expenses as against the pursuers. There was a question whether it did not give Taylor also his expenses; and that was a point of practice

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disputed by the parties. All that was to be done was to apply to * tax the expenses; but the other party contended that it was not to fix them with expenses, and this difference of opinion made me inquire into the practice. Though the decree is in terms of the libel, that is still to imply expenses. But that point is not material, for a subsequent interlocutor finds the appellant liable to the pursuers in expenses. Here Taylor, in his absence, had a decree against him in the terms of the libel with expenses. Now, is

it consistent with reason to find a decree against him in his absence, saddling him with the costs, and not let him in to dispute that decree? It is said, that he had no right to be there; but I agree with my noble friend that he had an interest. Whether he had or had not an interest, it was material whether he should have these terms imposed on him, that is, that he, being a bankrupt, could not go on at all without giving security for the costs of the pursuers. Having been let in, the Lord Ordinary found against him in terms of the libel. He reclaimed to the second division of the Court against that interlocutor, and the second division made an order by which he was let in without any terms. That induced Taylor to go to further expenses, and he was called on to give in a revised condescendence, which he did. Then comes the next interlocutor, by which the Lords ordained him to find sufficient caution for the whole of the expenses of process. The Court afterwards, in advising the case, pronounced judgment: "Having heard the counsel for the respondents in respect of no appearance for the defender, William Taylor, and of the former procedure, refuse the desire of the reclaiming note," &c. Now, see in what situation that put Taylor. If any case occurred in Scotland which showed the practice to warrant this course, if any avowed practice of this sort was shown, I would not advise your Lordships to go against it. * But no such practice exists; the practice * 369 is, to call on bankrupt's pursuers for caution; no such practice exists as to defenders, and this is the first disputed case of practice in respect to them; and there is only one case at all like it, which is that of *Lyall v. Mudie*, (a) and which still materially differs from this, inasmuch as Lyall was not drawn in by the Court nor by the parties. This is a point of authority too slender to require of the defender to give security for costs. But the case of *Lyall v. Mudie* varies in other respects from this case; Lyall was there the charger, though not stated so in the report, in the origin of the suit, and was substantially the pursuer. It furnishes no authority in point for this case; it was made a subject of discussion before the law commissioners, whether the provision to get

(a) 8 Shaw & D. 153.

security for costs, from plaintiffs even, was expedient, inas-much as it would prevent a poor man from bringing his suit; but it was never discussed whether a defendant is to find such security, as he is brought reluctantly before the Court. I am clear on this point; I see no room for doubt on it; and I think your Lordships ought to reverse the interlocutor of the 4th of December, and thereby enable the appellant to proceed without complying with that order. I do not say that there may not be a case in which security for costs could not and ought not be required from a defender. There may be a case in which a bankrupt may take the conduct of the defence out of the hands of the assignees; in such case it may be proper to compel him, *in limine*, to give sufficient security for the costs of the pursuer. My strong impresson is, that whatever way your Lordships decide, it would be useful to both these parties to have the case settled out of Court.

* 370 * LORD WYNFORD. — The pursuer here says the defender had no right to appear; the defender insists that he had a right, and he was in fact allowed to come in, on payment of two guineas. After two years of litigation, the pursuer applies for, and obtains from the Court, an order on the defender to find security for his costs. I am astonished that the Court ever granted such an order, or that such a law should exist in any part of the kingdom. After you compel a man into Court, then you tell him he cannot go on with the suit, or be heard, until he gives security for your costs. I feel as anxious as any man, that parties should, in certain cases, give security for costs before they proceed; and although I agree with my noble and learned friend that the law commissioners would not recommend any law to that effect, I have myself, in a bill which I brought into the House of Lords last night, (a) included a provision for that purpose. But I would not arm any Court with such a power, unless in the case of a vexatious plaintiff. It was said in the argument, that this case is decided by the case of *Taylor v. Fairlie* in this House, and that this appellant has no interest in the

(a) This bill did not pass into a law.

lease. I looked into the report of that case, (a) and no such thing is decided by it. This man has still an interest. But suppose he has not, the pursuers brought him into Court as a defender, and the Court allowed him to go on for two years, without imposing any conditions on him. The case would be different if they imposed these terms on the appellant when he first appeared to the suit. In this country, if a party wants security for costs, he must apply for it in the first instance. The decisions in Scotland are not governed by what passes in this country; *our practice *371 is more consistent with equity than this decision. I agree with my noble and learned friend as to the distinction he took between this case and that of *Lyll v. Mudie*. It appears to me impossible to support the judgment appealed from; and although the decision of this House upon it will open the litigation anew, even so I think it ought to be reversed.

The interlocutor of 4th December was reversed accordingly, and the cause remitted.

(a) 4 Shaw & D. 450; 2 Wilson & S. 101.

FROM THE COURT OF CHANCERY.

CADELL v. PALMER AND OTHERS.

1832.

THOMAS CADELL *Appellant.*

ARTHUR PALMER, CHARLES CADELL EDRIDGE, HENRY BENGOUGH, HENRY RICKETTS, the younger, RICHARD RICKETTS, the younger, WILLIAM IGNATIUS OKELY and ANN ELIZA- BETH, his wife, late ANN ELIZABETH BEN- GOUGH, spinster, and ANN RICKETTS, the younger, WILLIAM PETER LUNELL, JOHN EVANS LUNELL, GEORGE LUNELL, SARAH BENGOUGH, and GEORGE BENGOUGH . . .	}	<i>Respondents.</i> ¹
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Devise. Perpetuity.

A limitation, by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years, as a term in gross and without reference to the infancy of any person, is a valid limitation. *Secus*, if to the term in gross of twenty-one years be added the number of months equal to the longest or ordinary period of gestation.²

This being held to be the established rule, a decree of the Court below,

¹ S. C., 7 Bligh N. S. 202; 10 Bing. 140.

² The rule, here settled and established by the House of Lords, has ever since this decision been followed in England and in the United States. See 1 Jarman Wills (3d Eng. ed.) 227 *et seq.*, 232, 233, 262, 264; Stuart v. Cockerell, L. R. 7 Eq. 363; Odell v. Odell, 10 Allen, 4, 5; Lovering v. Worthington, 106 Mass. 86; Sears v. Putnam, 102 Mass. 5, 7; SHAW C. J. in Nightingale v. Burrell, 15 Pick. 111; Fosdick v. Fosdick, 6 Allen, 41; Proprietors of Church in Brattle Square v. Grant, 3 Gray, 142, 152; Thorndike v. Loring, 15 Gray, 391; Otis v. McLellan, 13 Allen, 339; Sears v. Russell, 8 Gray, 86; Loring v. Blake, 98 Mass. 253; Smith v. Harrington, 4 Allen, 566; Welsh v. Foster, 12 Mass. 97; 4 Kent, 267; Fowler v. Deparr, 26 Barb. 224; Tator v. Tator, 4 Barb.

declaring that a limitation by way of executory devise, which was not to vest until after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons, who were living at the testator's decease, and of whom seven only were to take interests under the devise, is a valid limitation, was affirmed accordingly.

February 15, 1832. May 20, June 25, 1833.

HENRY BENGOUGH, Esq., by his will, dated the 9th of April, 1818, gave and devised, from and after the decease of his wife, Joanna Bengough, his messuage * with the * 373 gardens, stables, and other appurtenances belonging thereto, situate in St. James's Square, Bristol, to the Rev. Charles Lucas Edridge, Arthur Palmer, the Rev. Cadell Edridge, and George Wright, their heirs and assigns for ever, upon trust, for sale; and directed the proceeds to sink into and become part of his personal estate. He further gave and devised to the said trustees, their heirs and assigns, certain other real estates, upon trust, to permit his wife to occupy a part thereof during her life, and, after her decease, to pay out of the rents and profits an annuity of 300*l.* to his nephew, George Bengough, for life, and an annuity of 200*l.* to his nephew, Henry Bengough, for life; and subject to the payment of the said annuities, and otherwise subject, as in the said will mentioned, upon trust, from time to time, during the term of twenty-one years, to be computed from the day of the testator's decease, to collect and receive the rents and profits of all his real estates so devised to them (except the house in St. James's Square); and from time to time during the continuance of the said term to lay out the moneys to arise from such rents and profits in the purchase of freehold estates of inheritance in England, when and as often as there

431; *Miller v. Macomb*, 26 Wend. 229; *Ferris v. Gibson*, 4 Edw. Ch. 707; *Tollemache v. Coventry*, 2 Cl. & Fin. 611, 623, 624; *Andrews v. Drever*, 3 Cl. & Fin. 314, 332, 333; *Phipps v. Ackers*, 9 Cl. & Fin. 588, 598; *Dungannon v. Smith*, 12 Cl. & Fin. 546, 550, 551, 629; *Boughton v. Boughton*, 1 H. L. Cas. 406; *Cole v. Sewell*, 2 H. L. Cas. 186, 233; *Lewis Perpetuities*, 140-172; *Perry Trusts*, §§ 379, 380; *Ker v. Dunganon*, 1 Dr. & W. 509; *Tench v. Cheese*, 6 De G., M. & G. 453; *Monypeeny v. Dering*, 2 De G., M. & G. 145; *Barrington v. Liddell*, 2 De G., M. & G. 480.

should be a surplus in hand amounting to the sum of 1500*l*. And he directed the estates so to be purchased to be conveyed to the trustees, upon the same trusts and conditions as were thereafter (a) limited concerning his estates there-
 inbefore devised; and that the trustees should not permit more than 500*l*. to remain in bankers' hands, but should invest the same in the three per cent consolidated
 * 374 bank * annuities until a convenient purchase could be found, and add the interest to the principal, to accumulate during the said term in the same manner as the rents and profits of the real estate were before directed to accumulate; and as to all the said trust estates and hereditaments so by him thereby devised (except his said messuage in St. James's Square), upon trust, that the trustees for the time being should retain and stand possessed of the same during the term of one hundred and twenty years, to commence from his death, if his said nephews, George Bengough and Henry Bengough, his nephew, James Bengough, his great nephews, Henry Ricketts the younger, and Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, his great niece, Ann Ricketts the younger, the ten children then living of the said Charles Lucas Edridge (for whose names a blank was left in the will), and the eleven children then living of the said Arthur Palmer (whose names were mentioned), or any or either of his said nephews and niece, and great nephews and great niece, or any or either of the said several children of the said Charles Lucas Edridge and Arthur Palmer, should so long live; and also during the term of twenty years, to be computed from the expiration or other sooner determination of the said term of one hundred and twenty years determinable as aforesaid, nevertheless upon trust for his said nephew, George Bengough, for a term of ninety-nine years, if he should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue; and from and after the

(a) See the report of this case under the title of *Bengough v. Edridge*, 1 Sim. 273, where the Vice-Chancellor ordered "hereinbefore" to be substituted for "hereinafter." That part of the decree is not appealed from.

expiration or other sooner determination of the said term of ninety-nine years, then in trust for the first, second, third, fourth, fifth, sixth, and all and every other and subsequent born son of the same George Bengough, severally and successively, according to the priority of their births: and after the determination of the estate * and interest of * 375 each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under, or as answering the description of heir male of his body, in trust for the person who for the time being and from time to time should answer the description of heir male of his body, or who, in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to the same son and the heirs male of his body, to hold to the same son or person respectively for a term of ninety-nine years, if the same son or person respectively should so long live; and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue, every elder of the same sons, and the person who for the time being and from time to time should answer, or who, in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being should answer, or in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body.

The testator then declared several successive trusts of the said estates during the said terms of one hundred and twenty years and twenty years, in favour of his nephews, Henry Bengough and James Bengough, his great nephews, Henry Ricketts the younger, and Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, and his great niece, Ann Ricketts the younger, respectively, and their respective first and other subsequent born sons, and of the persons who for the time being should be, or who in case of the death of their respective parents would be heirs male of such sons respectively, similar to the trusts before stated to have been declared in favour of * the said George Bengough, and * 376

his first and other subsequent born sons, and of the person who for the time being should be, or who in case of the death of his parent would be, heir male of the body of each of the same sons respectively, except that he directed that the estates of the said Henry Ricketts and Richard Ricketts, and of their respective sons, and of the person or persons answering the description of heirs male or heir male of their respective bodies ; and also the estates of the said Ann Elizabeth Bengough and Ann Ricketts, and of their respective husbands, and of their first and other sons, and of the persons answering the description of heirs male of their respective bodies, should respectively cease, if he or they for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the income of the said trust estates. And from and after the determination of the said respective estates and interests, then in trust for the person or persons respectively who for the time being and from time to time should answer the description of the testator's heir or right heirs-at-law ; and if there should be more than one, in the same proportions, as they would be entitled to a real estate descending from the testator as the first purchaser, and vesting in him or them as his right heirs to hold to the same person or persons respectively, if more than one, as tenants in common, as to each of the same persons respectively, for a term of ninety-nine years, if the same person should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue.

The testator further directed that each of the said terms of ninety-nine years should be computed from the time when the person or persons respectively to whom the same
 * 377 were limited should become entitled to the income * of all or any part of the said trust estates, under the limitations thereinbefore contained ; and that in case the said limitations in favour of persons unborn could not take effect precisely in the order in which they were directed, and there should consequently be any suspension of the beneficial ownership, by reason that the persons entitled to take under the same limitations or trusts should not be then born, in that

case the income of his said devised trust estates should, during such suspension of ownership, belong to and be enjoyed by the person or persons for the time being entitled, or who, in case there had not been such suspension of ownership, would for the time being have been entitled to the next estate in remainder, subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled, under any prior limitation, to receive the income of his said trust estates from his, her, or their actual birth, or respective births.

The testator then directed, that after the expiration or sooner determination of the said terms of one hundred and twenty years and twenty years, his said trust estates should be conveyed and assured by his then trustee or trustees thereof to such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, in tail, or in fee in them, if the same had by his will been devised, settled, or assured to the use of his nephew, the said George Bengough, and his assigns for his life, with remainder to his first and other sons successively, according to the priority of their births in tail male, with remainder in similar estates for life, and remainders in succession to the said Henry Bengough, James Bengough, Henry Ricketts, Richard Ricketts, Ann Elizabeth Bengough, Ann Ricketts, and their sons respectively, with a proviso for the cesser of the estates of the said Henry Ricketts and * Richard Ricketts, and * 378 their respective first and other sons, and the heirs male of their respective bodies, who for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the said income; and also for the cesser of the estate of the said Ann Elizabeth Bengough and Ann Ricketts, and their respective husbands, and their first and other sons, and the heirs male of their respective bodies, who for the time being should make a like refusal with reversion to the testator's own right heirs. And he further directed, that the person or persons to whom such conveyances should be made, should have such estate in the said trust estates as he

or they would at that time be entitled to take under the said limitations, if the same had been actually made by his will, with the same or the like remainders over as if the said trust estates had been devised by his will in manner aforesaid, or as near thereto as might be, and the circumstances of the case and the rules of law and equity would permit; yet, nevertheless, that no such person should have or be entitled to a vested estate or any other than a contingent interest until the expiration or sooner determination of the terms of one hundred and twenty years and twenty years; and he declared that such limitations were introduced into his will only for the purpose of ascertaining the objects to whom such conveyances should be made, and not for the purpose of making any immediate devise or gift to, or raising any immediate or present estate by way of trust or otherwise for them; on the contrary thereof, he directed that during the said terms of one hundred and twenty years and twenty years, no person or persons should be entitled, at law or in equity, to any beneficial estate in his said trust estates, or the income thereof, by way of vested interest, for any longer period than ninety-nine years, determinable as before

* 379 * mentioned, and that, in the events and in the mode before expressed, heirs or heirs of the body should be entitled to take in the first instance, and as purchasers in their own right. And he directed, that if at any time during the said terms of one hundred and twenty years and twenty years, each of the male persons who for the time being should be entitled to the income of his said trust estates should require the same, it should be lawful for his trustees to convey to each or any person making such request the said trust estates, or part thereof, as he should be entitled to under the limitations thereinbefore contained, for an estate of freehold for the life of the same person, so as to give him or her an estate of freehold instead of an estate for ninety-nine years.

The testator, after giving various other directions and powers concerning the said trust estates, and after bequeathing several legacies and annuities, gave and bequeathed to the said trustees, their executors and administrators, all the residue of his personal estate whatsoever, upon trust, that

they should either continue his moneys upon the securities upon which they should be invested at his decease, or call in the same, and sell all such parts of his residuary estate and effects as should not consist of money, or securities for money. And he directed that, during the term of twenty-one years, to be computed from the day of his decease, the trustees for the time being of his will should receive the dividends, interest, and annual income of all his residuary estate, and from time to time during such term invest all such dividends, interest, and income, and the accumulations of the same, in their names, either in the three per cent consolidated bank annuities, or upon mortgages of freehold hereditaments in Great Britain, as they should think proper, as an accumulating fund, in order to increase the principal of his residuary estate *during such term of twenty-one *380 years; and should, with all convenient speed, from time to time during that term, lay out and invest all his residuary estate and effects, and all accumulations thereof, in purchases of freehold hereditaments of an estate of inheritance in fee-simple, in England or Wales, when eligible purchases should arise; which estates, so to be purchased, should be conveyed unto and to the use of the trustees, in fee, upon the same trusts, and under and subject to the same and the like powers, provisoes, and limitations as were by him thereinbefore declared, concerning his said estates devised to them in trust as thereinbefore mentioned, or as near thereto as the death of parties, the change of interests, and other contingencies would admit; and he appointed his said trustees to be executors of his said will.

The testator died in April, 1818, and his three first-named trustees and executors shortly afterwards proved his will, and became his legal personal representatives, George Wright having renounced probate, and executed a deed of disclaimer to them as to the trust estates.

Ann Ricketts, the testator's only sister, and next of kin at the time of his death, died in the month of October, 1819, having by her will appointed the respondents, W. P. Lunell, J. E. Lunell, and George Lunell executors thereof; and they

proved the same, and became her legal personal representatives.

Mrs. Bengough, the testator's widow, died on the 10th of June, 1821, having duly made and published her will, and appointed as executors thereof the said Rev. Charles Lucas Edridge (since deceased), and Thomas Cadell, the appellant, who duly proved the same, and thereby became her legal personal representatives.

George Bengough, the testator's nephew, and first taker of an estate under the limitations in the will, filed
 * 381 * his bill in Chancery in the year 1821 (amended in 1823) against the acting trustees and executors, and against the said Henry and James Bengough, Henry and Richard Ricketts, Ann Bengough, and Ann Ricketts, the younger, and also against the said personal representatives of Joanna Bengough, the widow, and of Ann Ricketts, the sister, of the testator; and after stating the said will and his own rights under it, and as heir-at-law and one of the then next of kin of the testator, he prayed (amongst other things) that the will might be declared to be well proved, and that the trusts thereof, so far as the same were good in law, might be decreed to be carried into execution, and that an account might be taken of the personal estate and effects of the testator, and of his funeral and testamentary expenses, and debts and legacies; and that the clear residue of the personal estate might be applied upon the trusts of the will, so far as the same were effectual in law; and as far as the same were ineffectual in law, then to such person or persons as would, in such case, by law be entitled thereto: and that an account might be taken of the testator's real estate, and of the rents received by the trustees; and that what should be found due from them on taking that account might be applied upon the trusts of the will, as far as the same were good in law; and that the Court would be pleased to declare how far the trusts of the real and personal estate were good; and as far as the trusts were declared to be void, that the plaintiff might be declared to be entitled to the real estate; but, in case the trusts of the will should be considered valid, then that such of the rents and profits of the estates devised to the trustees

in possession, as accrued during the life of Mrs. Bengough, might be applied in the purchase of freehold estates of inheritance in England or Wales, *and that the * 382 annuities of the plaintiff and Henry Bengough might be paid out of the rents and profits that had accrued, and should accrue after her death; and that the residue thereof might, during the remainder of the term of twenty-one years, be also applied in the purchase of freehold estates of inheritance in England or Wales; and that such estates, when purchased, might be conveyed to the trustees upon the trusts declared of the estates so to be purchased; and that, as often as there should be the sum of 1500*l.* arising from the rents and profits of the devised estates, it might be laid out in such purchases of freehold estates as aforesaid; and that the plaintiff might be declared to be entitled to the immediate possession and enjoyment of the said estates so to be purchased, for the term of ninety-nine years, if the plaintiff should so long live, such term to be computed from the death of the testator; and that in case the said rents and profits should not, as soon as they amounted to 1500*l.*, be so laid out, the plaintiff might be declared entitled to the interest and dividends thereof from the time the same amounted to 1500*l.*, until the same should be laid out in the purchase of freehold estates; or that, in case the said trusts were partly valid and partly invalid, then that proper directions might be given for effectuating such of the trusts as were valid, and for declaring and effectuating the rights of the persons entitled, so far as the trusts were invalid.

The defendants having put in their answer to the bill, the cause came on to be heard before the Vice-Chancellor in 1823, when an order of reference was made to the Master, who, in pursuance thereof, reported that the plaintiff was, at the time of the death of the testator, and then was, the heir-at-law of the said testator, and that the said Ann Ricketts, deceased, the *sister of the said testator, was his only * 383 next of kin at the time of his death, and that William P. Lunell, J. E. Lunell, and George Lunell, were then her legal personal representatives, and the only persons, who, together with the plaintiff, and the said Henry Bengough,

James Bengough, and Ann Elizabeth Bengough, (the children of the said testator's late brother, George Bengough), and the said Charles Lucas Edridge, and the appellant, the executors of Joanna Bengough, the widow of the said testator, would in case of intestacy have been entitled to distributive shares of the personal estate of the testator.

Upon the death of James Bengough, the suit was revived against Sarah Bengough, his widow and personal representative; and William Ignatius Okely, having married Ann Elizabeth Bengough, was subsequently made a party to the suit.

The cause having come on to be heard, on further directions, before the Vice-Chancellor, his Honor, by a decree, bearing date the 24th day of January, 1827, ordered it to be declared (amongst other things) that the testator's said will ought to be established, and the trusts thereof carried into execution, &c. His Honor, in giving his judgment in respect of that part of his decree, said, "that although the rule of law be framed by analogy to the case of a strict settlement, where the twenty-one years were allowed in respect of the infancy of a tenant in tail, yet he considered it to be fully settled, that limitations by way of devise or springing use might be made to depend upon an absolute term of twenty-one years after lives in being." (a)

From this part of the decree the personal representative of the testator's widow appealed to the House of
 * 384 * Lords, and the appeal came on for hearing in February, 1832.

Sir Edward Sugden and *Mr. Lynch*, for the appellant, argued to the following effect: The testator in this case had two objects in view; first, to suspend the vesting of the inheritance for a period of one hundred and twenty years, determinable upon twenty-eight lives, and for an absolute term of twenty years from the death of the survivor of them, being, as he conceived, within the rule of law against perpetuity. His second object was, during this period of suspension of the inheritance (after a period of twenty-one years

(a) *Bengough v. Edridge*, 1 Sim. 267.

allotted for accumulation), to confer the enjoyment of the estate upon, first, his nephew, G. Bengough, for a period of ninety-nine years, determinable on his life, and the said terms of one hundred and twenty years and twenty years, with remainder to his son (not born at the testator's decease) for a like period of ninety-nine years, determinable on his life, &c., with remainder to the grandson of his said nephew for a like period, determinable on his life, &c., with remainder to the great grandson of his said nephew for a like period, determinable on his life, &c.; and so on, in respect of all the heirs male of the body of his nephew, George, all taking as purchasers, and all taking estates only for ninety-nine years, determinable on their lives respectively, and on the terms of one hundred and twenty years and twenty years. And he conferred similar limitations on his nephew Henry, and the heirs male of his body, &c., and on his third nephew, and the heirs male of his body, &c.; these being the persons that would take in case the inheritance was not suspended, and being the persons to whom the inheritance is to be conveyed when the suspension is to cease, and to whom at any time the trustees may limit an estate of freehold. We submit that the whole machinery of this will is a fraud on the rule of law against perpetuity. * The accumulation is * 385 taken for the whole term of twenty-one years, allowed by the Thellusson Act, (a) and without reference to any minority or any legitimate object of settlement; and it is not until the expiration of that term that the limitations are made to commence. Accumulation and executory limitations were, by the law as it stood before the Thellusson Act, coextensive; but a testator could not first accumulate for lives in being and twenty-one years, and then postpone the vesting for a like further period. The limitation of the estates for one hundred and twenty years, if twenty-eight persons, or any or either of them, shall so long live, taken by itself, is not objected to; but there is added a term in gross of twenty years upon the same trusts. The twenty-one years allowed by the rule after lives in being were admitted for the purposes of gestation and infancy, and were never allowed as an

(a) 39 & 40 Geo. 3, c. 98.

absolute term. Here the twenty years are taken as an independent term, merely because that term falls within the words of the rule, altogether disregarding the principles upon which it was founded. After every rule has been separately resorted to, and the time allowed by it exhausted, then comes a trust for the very persons who would be entitled to the freehold and inheritance under the previous trusts, if regular trusts had been declared for life and in tail, according to the usual form of settlements. All this machinery is a vain attempt at a perpetuity, and the consequences are obviously mischievous. Sir JOSEPH JEKYLL, in the case of *Stanley v. Leigh*, defines a perpetuity, and Chief Baron GILBERT, in his *Treatise on Uses*, tells us what tends to it. "All limitations," he says, "that tend to the provision of a family, and to secure against contingencies that are within the parties'

own immediate prospect, are to be favoured; but all * 386 limitations * that perpetuate, or tend to a perpetuity, are in themselves void, and repugnant to the policy of the law." (a) When Lord NOTTINGHAM was asked, in the *Duke of Norfolk's Case*, where he would stop, he answered, "I will stop everywhere, when any inconvenience appears; nowhere, before; for whensoever the bounds of reason or convenience are exceeded, the law will quickly be known." Now the time to stop has arrived; the bounds of reason are exceeded, and the inconvenience is manifest. The conclusion to which it is desired to bring your Lordships is, that the trusts declared of the personal estate and effects of the testator should be declared void, and the residue of such personal estate divided among the parties entitled to distributive shares thereof, as if the testator had died intestate.

In former cases the question has been, who, at a limited period after the testator's death, was to take the estate? And in the meantime either a different set of persons or the heir-at-law was to take it; but here the testator meant, that from his death there shall be taken devises under his will during the existence of the fictitious terms of one hundred and twenty and twenty years. The persons are to take, not for accumulation, not for any thing collateral to the testator's

(a) *Gilb. on Uses*, 359.

general object, but as devisees; and after the expiration of one hundred and twenty and twenty years a new taker is not to be sought for, but the person then to take is precisely the same person who has taken and then is in possession under the previous limitations. Terms of years are introduced into marriage settlements and wills, for the purpose of raising portions, charges, or other sums of money, in order to provide for the necessities of families. These terms are not introduced into this will for any such purpose; and the legal estate * for these terms is not conferred on trus- * 387
tees, distinct from the holders of the inheritance, in order that they may raise a sum of money for the necessities of a family. The whole legal fee-simple is vested in the trustees, and they are merely directed to stand possessed of a portion of the inheritance for the terms of one hundred and twenty and twenty years. But they have no duty to perform, and the only purpose for which these terms are created is to evade the law. The law says, that a succession of life-estates cannot be given to unborn issue; and yet, if the limitations of this will are to be supported, there is a contrivance by which any testator may evade the law. The trusts of a term can be no otherwise limited in equity than the estate may be limited at law. It is quite clear, that the testator could not have attempted to carry his two objects into effect without the machinery of the term of one hundred and twenty years, determinable on the twenty-eight lives, and of the term of twenty years. Now if this machinery can be displaced, if part only be taken away, the whole fabric must fall. If we take away this absolute term of twenty years, the whole machinery must give way.

We shall, therefore, first apply ourselves to this objection, that the testator has taken an absolute term of twenty years after lives in being, which is not allowed by the law. Every executory devise being, as far as it goes, a perpetuity, and being of late origin, introduced, or rather allowed, for the purpose of indulging testators in the distribution of their property, but within certain limits, it is incumbent on a party whose title depends on it, to show that it does not exceed the limit allowed. It will be for the other side to do this. What

his first and other subsequent born sons, and of the person who for the time being should be, or who in case of the death of his parent would be, heir male of the body of each of the same sons respectively, except that he directed that the estates of the said Henry Ricketts and Richard Ricketts, and of their respective sons, and of the person or persons answering the description of heirs male or heir male of their respective bodies ; and also the estates of the said Ann Elizabeth Bengough and Ann Ricketts, and of their respective husbands, and of their first and other sons, and of the persons answering the description of heirs male of their respective bodies, should respectively cease, if he or they for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the income of the said trust estates. And from and after the determination of the said respective estates and interests, then in trust for the person or persons respectively who for the time being and from time to time should answer the description of the testator's heir or right heirs-at-law ; and if there should be more than one, in the same proportions, as they would be entitled to a real estate descending from the testator as the first purchaser, and vesting in him or them as his right heirs to hold to the same person or persons respectively, if more than one, as tenants in common, as to each of the same persons respectively, for a term of ninety-nine years, if the same person should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue.

The testator further directed that each of the said terms of ninety-nine years should be computed from the time when the person or persons respectively to whom the same * 377 were limited should become entitled to the income * of all or any part of the said trust estates, under the limitations thereinbefore contained ; and that in case the said limitations in favour of persons unborn could not take effect precisely in the order in which they were directed, and there should consequently be any suspension of the beneficial ownership, by reason that the persons entitled to take under the same limitations or trusts should not be then born, in that

case the income of his said devised trust estates should, during such suspension of ownership, belong to and be enjoyed by the person or persons for the time being entitled, or who, in case there had not been such suspension of ownership, would for the time being have been entitled to the next estate in remainder, subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled, under any prior limitation, to receive the income of his said trust estates from his, her, or their actual birth, or respective births.

The testator then directed, that after the expiration or sooner determination of the said terms of one hundred and twenty years and twenty years, his said trust estates should be conveyed and assured by his then trustee or trustees thereof to such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, in tail, or in fee in them, if the same had by his will been devised, settled, or assured to the use of his nephew, the said George Bengough, and his assigns for his life, with remainder to his first and other sons successively, according to the priority of their births in tail male, with remainder in similar estates for life, and remainders in succession to the said Henry Bengough, James Bengough, Henry Ricketts, Richard Ricketts, Ann Elizabeth Bengough, Ann Ricketts, and their sons respectively, with a proviso for the cesser of the estates of the said Henry Ricketts and * Richard Ricketts, and * 378 their respective first and other sons, and the heirs male of their respective bodies, who for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the said income; and also for the cesser of the estate of the said Ann Elizabeth Bengough and Ann Ricketts, and their respective husbands, and their first and other sons, and the heirs male of their respective bodies, who for the time being should make a like refusal with reversion to the testator's own right heirs. And he further directed, that the person or persons to whom such conveyances should be made, should have such estate in the said trust estates as he

Ashe; (a) and the next case in point of date is that of *Lloyd v. Carew*. (b) Upon what ground was that case decided? On the ground of twenty-one years being allowed? No; but on the ground that a reasonable time was necessary to be allowed to perform the condition, which could not have been executed in the life of the donor. The bill was in the first instance dismissed, but that decision was reversed in the House of Lords. After the case of *Luddington v. Kime*, (c) next in date came a very important case, which clearly shows that the utmost then allowed was a life or lives in being. That was the case of *Scatterwood v. Edge*. (d) The court held that twenty or thirty years was the probable result of taking lives in being, and in the general use made of taking lives in a family settlement, limiting one remainder after another, that might be a fair calculation; but when you come to talk of twenty-eight lives, the calculation must be, not twenty or thirty years, but fifty or seventy years, thereby substituting years for lives.

The cases that come next, are *Marks v. Marks*, (e) and *Gore v. Gore*, (g) and *Maddox v. Staines*, (h) and *Stephens v. Stephens*, (i) which last was decided by Lord HARDWICKE, as Chief Justice, and Lord TALBOT, as Lord * 391 * Chancellor, and which Lord TALBOT hoped would be a leading case in the decision of all questions of this kind. *Gurnell v. Wood* (k) is the next case, and in that it is quite clear what Lord Chief Justice WILLES meant, taking the whole of his judgment together, for when the cases alluded to by him are *Stephens v. Stephens*, and *Taylor v. Biddal*, and we have the authority of Lord HARDWICKE that before *Stephens v. Stephens*, *Taylor v. Biddal* was the only case, it is clear he must have intended the twenty-one years in reference to minority: and he says, executory devises are in wills what contingent remainders are in settlements; and, by what he says in another part of his judgment, he means that in respect

(a) 1 Vern. 234, 304.

(c) Ld. Raym. 203-7.

(e) 10 Mod. 419.

(h) Id. 422.

(k) Willes, 213.

(b) Pre. in Cha. 72; Show. C. P. 137.

(d) 2 Salk. 229.

(g) 2 P. Wms. 28, 63.

(i) Ca. Temp. Talb. 228.

of a contingent remainder, when the contingency happens, it vests in the remainder-man, but he cannot alienate until he attains twenty-one. But in respect of executory devises, which were taken from contingent remainders, the vesting, as well as the power of alienation, may be suspended until the devisee attains twenty-one. From the case of *Sheffield v. Lord Orrery*, (a) another case decided by Lord HARDWICKE as Lord Chancellor, it appears that Lord HARDWICKE thought that the twenty-one years must be in reference to minority, which was the exact point which he decided in *Stephens v. Stephens*. In the same year (b) the case of *Gulliver v. Wicket* was decided in the King's Bench. (c) The limitation there, no doubt, was a contingent remainder, and in reference to the devise, and taking the whole of what is said by the Chief Justice, it must be intended, that, speaking of twenty-one years, he referred such time to minority; but at all events, the most that can be said is, that this case left the question the same as it was before. Then came the * case of * 392 *Bullock v. Stones*, (d) a very important case, as it shows that Lord HARDWICKE retained the same opinion which he entertained in the preceding cases. *Goodman v. Goodright* (e) is the next case, in the Court of King's Bench: it is unnecessary to state the facts, but merely to refer your Lordships to what Lord MANSFIELD said. In Michaelmas term in the same year was decided the important case of *The Duke of Marlborough v. Godolphin*, (g) by which it appears that Lord NORTHINGTON entertained the same opinion as Lord TALBOT and Lord HARDWICKE did, that a term of twenty-one years was not a term in gross. That case came before this House, and the same doctrine is laid down in the printed case for the respondent, signed by *Mr. York* and other eminent counsel, and is not contradicted by the reasons on the other side. (h) The next case that occurred, after that of *Doe v. Fonnereau*, (i) is the case of *Heath v. Heath*, (k) decided by

(a) 3 Atk. 282.

(c) 1 Wilson, 105.

(e) 2 Burr. 874.

(g) 8 Bro. P. C. 245.

(k) 1 Bro. C. C. 147.

(b) 1745.

(d) 2 Ves. Sen. 521.

(f) 1 Eden, 404, 418.

(i) Doug. 470, 490.

LORD THURLOW. Is not that an actual case of minority? Is it any thing more than what might be effected by legal limitations? A limitation to Edward Heath for life, with remainder to his son in tail, with remainder to William Heath in fee. It is in effect that it is a devise to Edward Heath in fee, but if he should die without leaving a son at his death, capable of alienating, it should then go over. Our proposition is, that the term is not an absolute term of twenty-one years; that it has in all cases reference to infancy, and all that that case decides is, that it is not necessary that the infancy or minority should be that of the party to take, or the party from whom it is taken. The case of *Jee v. Audley*, (a) decided by

* 393 LORD KENYON, as Master of the Rolls, * must have been erroneously decided, if this term of twenty-one years be an absolute term, and so must have been the case of *Routledge v. Dorrell*, (b) before Lord ALVANLEY, as Master of the Rolls; because if there may be an absolute term of twenty-one years, the testator's daughter might have appointed to issue born within the twenty-one years after her death, but it was decided otherwise. The next case of *Long v. Blackall* (c) is most important, as it contains the opinion of Lord KENYON, distinctly laid down, as to the length to which executory devises can extend. That case is also important, as being the first that allowed the time for periods of gestation at both ends of the term. Two years afterwards the case *Thellusson v. Woodford* (d) came on to be heard before Lord LOUGHBOROUGH in the Court of Chancery, assisted by the Master of the Rolls (Lord ALVANLEY) and Justices LAWRENCE and BULLER. In that case the exact question did not arise, for there was no term of twenty-one years; it was merely a case of lives in being. But Lord ALVANLEY being afraid, from what Mr. Justice BULLER had said, that it might be inferred that the twenty-one years might be an absolute term, without reference to minority, in giving judgment, expressed himself decidedly to the contrary. (e) When that case came afterwards before this House, the Judges attended, and Lord Chief

(a) 1 Cox, 324.

(b) 2 Ves. Jr. 357.

(c) 7 T. R. 102.

(d) 4 Ves. 319.

(e) See 4 Ves. 319, 326, 337.

Baron MACDONALD delivered their opinion, and in expressing that opinion, and referring to Lord NOTTINGHAM's judgment in the *Duke of Norfolk's Case*, he says, "With an easy interpretation, we find from Lord NOTTINGHAM what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands unalienable beyond the *time at which one in remainder would * 394 attain his age of twenty-one years, if he were not born when the limitations were executed." (11 Ves. 135.) And again, he says (p. 143), "The established length of time during which the vesting may be suspended is during a life or lives in being, the period of gestation, and the infancy of such posthumous child." And Lord ELDON, in the same case (p. 146), expresses himself to the like effect, all strongly implying, that if there be a term added after lives in being, it must be with reference to minority.

But your Lordships may see the opinion of Lord ELDON more clearly expressed in the case of *Griffiths v. Vere*; (a) that opinion most clearly implies that the term of twenty-one years is not an absolute term, but qualified and referable to infancy. In the case of *Crook v. Devanda*, (b) also before Lord ELDON, it was decided that a limitation, to take effect at the expiration of thirty years from the testator's decease, was too remote; and in the case of *Lade v. Holford*, (c) the suspense of property for twenty-six years was held too remote; and in *Proctor v. The Bishop of Bath and Wells*, (d) the possible suspense of property for twenty-four years was held too remote.

Let us next proceed to the important case of *Beard v. Westcott*. (e) That case came on before Sir W. GRANT, Master of the Rolls; he sent it to the Judges of the Court of Common Pleas, who returned a certificate in 1810. The effect of that certificate, if not overruled, was to allow an absolute term of twenty-one years. Sir W. GRANT was not satisfied with that certificate, and entertaining the same

(a) 9 Ves. 131.

(b) Ib. 197.

(c) Amb. 479.

(d) 2 H. Bl. 358.

(e) 5 B. & Ald. 801.

opinion as his predecessor, Lord ALVANLEY, as to the absolute term of twenty-one years, he sent the case back to the

* 395 Court of Common Pleas, particularly * putting the question to the Judges. They returned a certificate (a) in 1813, confirming their former determination, and thereby establishing the validity of an absolute term of twenty-one years. Between these two certificates the point was most ably discussed by a very learned and able writer, who was against the validity of the absolute term of twenty-one years. The case came on afterwards before Lord ELDON, Chancellor, who, not being satisfied with the certificates, sent the case to the Judges of the Court of King's Bench for their opinion. The Judges of the Court of King's Bench differed from the Judges of the Court of Common Pleas, and returned a certificate (b) that the devises over were void, thereby confirming the opinions of Lords TALBOT, HARDWICKE, NORTHINGTON, MANSFIELD, KENYON, and ALVANLEY, that the term was not an absolute term, but referred to minority. The case came on again upon that certificate (c) before Lord ELDON, and it was objected to the certificate, that it did not contain a sufficient answer to the case, and that it could not be collected from it whether the circumstance that the limitations were to take effect at the end of a term of twenty-one years, without reference to the infancy of the person intended to take, created such a suspense in the vesting as to render the limitations void. But Lord ELDON said it was impossible that the Court of King's Bench should not have considered that point. The certificate afforded a substantial answer to the questions put, and the inclination of his own opinion was, that the Court of King's Bench was right. The question, therefore, as it appears to us, is decided by all these cases. There is not a single case that can be adduced where an absolute term has been allowed after a life or lives. These decisions, and the *dicta* of all

* 396 the learned Judges to whom we have referred, * establish the contrary, and that the term must be referable to minority.

(a) 5 Taunt. 392, 406.

(b) 5 B. & Ald. 814.

(c) 1 Turn. & Russ. 25.

Now, with respect to the text writers, and first in respect of Mr. Fearne, the passage in his book may probably be cited to induce your Lordships to think, that it was his opinion that an absolute term of twenty-one years was allowed. (a) But we submit that the whole of his reasoning on the point, and the cases which he refers to as illustrations, warrant the contrary inference, which is, that the period of twenty-one years, which he states to be the utmost limit after a life or lives in being for deferring the vesting of the estate, has reference to infancy. The late Mr. Cruise, in the sixth volume (b) of his Digest, and Mr. Justice BLACKSTONE, in the second volume (c) of his Commentaries, have also laid down, that the utmost length that has been allowed for the contingency of an executory devise is that of a life or lives in being, and twenty-one years afterwards. From the reasoning of these writers, and the cases cited by them, we are entitled to conclude, that they did not mean the twenty-one years as an absolute term. Now, if the term of twenty years cannot be an absolute term, if the testator has exceeded the limits allowed by taking this term, then the whole machinery must, as we conceive, fall to the ground. In *Lade v. Holford*, the whole was considered bad, and there was no modelling of it; so also it was held in *Crooke v. Devands*, already cited, in *Ware v. Polhill*, (d) in *Lord Southampton v. The Marquis of Hertford*, (e) and in *Marshall v. Holloway*. (g) . If, then, the term of twenty years be cut off, the consequence will be, that there will be persons *in esse*, and willing to take if they could be allowed to do so by law, during the term of twenty years. But they cannot take during that term, because it is * void, * 397 and yet the gift over cannot be accelerated, because the testator has said that no person shall take the estate as purchaser until the expiration of that term, and your Lordships would not violate the testator's intentions. There is one period of time, composed of both terms, upon which the testator says certain trusts are to arise. That period exceeds the boundary allowed by the law, and therefore all the trusts

(a) Con. Rem. & Ex. Dev. 431.

(b) 445.

(c) 174.

(d) 11 Ves. 257, 283.

(e) 2 V. & B. 54.

(g) 2 Swanst. 432.

must fail. After the cases of *Goring v. Bickerstaff* and *Thellusson v. Woodford*, there can be no doubt that the vesting of property can be suspended for any number of lives, with this qualification annexed by Lord Chief Baron MACDONALD and Lord ELDON, that they are not to exceed that number to which testimony can be applied to determine when the survivor of the lives dropped. Is that the case here? Of the twenty-eight lives, twenty-one are altogether unconnected with the parties or the testator, all young and unsettled in life. These twenty-one persons may go all over the world, to the East and West Indies, to North and South America, and how could it be possible in such a case to determine when the survivor dropped. But the purposes also for which the lives are taken must be legal. In *Thellusson v. Woodford*, they were taken for the purpose of accumulation, such purposes being then legal. But what are the lives here taken for? For the purpose of supporting limitations void at law. The testator is guilty of a fraud upon the rule of law by the use he has made of the twenty-eight lives; for it is a maxim of law, that that which cannot be done directly, cannot be done indirectly. But it is said that the exility of the interests, viz., one hundred and twenty years, determinable on lives and twenty years afterwards, out of which the trusts are to arise, privileges the trusts declared at this period of time; but in referring to perpetuity, limitations are to be considered according to their legal effect, and not by

* 398 the quantity of interests out of which they are * to arise; otherwise limitations held good in one case would be considered bad in another.

The term of one hundred and twenty years is as vicious as the term of twenty years is illegal, and the trusts declared of both are void; and so also are the ulterior trusts;—the direction to convey the inheritance from and after the expiration of the terms. All the limitations therefore being void, why should the trust for accumulation be retained? The accumulation was directed for purposes not allowed by the law, then why continue the accumulation? The heir-at-law and next of kin have a right to determine it. The point which arises between them is this: the personal estate is

directed to be laid out in the purchase of lands, to be settled to certain uses, which we hold to be illegal. The purpose and object the testator had in view is not, and it cannot be, accomplished. Then what superior right or equity has the heir-at-law over the next of kin to ask the Court that the property legally belonging to the next of kin, dedicated by the testator for purposes which cannot be effected, should belong to him? Where, in the will, has the testator shown a preference to his heir-at-law over his next of kin? The case of *Tregonwell v. Sydenham*, (a) is in point of principle in favour of the next of kin. It was decided there that the heir-at-law was entitled to all that was viciously given. Why? Because his right must be defeated by a valid disposition. Is not the same principle to be applied in case of personal estate and next of kin? Every thing belongs to the next of kin in like manner as to the heir-at-law, that is not taken away by valid disposition; here nothing is taken away by valid disposition. The personal estate must, therefore, be considered as undisposed of, and therefore belongs to the next of kin.

June 15.

* The further consideration of the case was then * 399 adjourned, and not resumed until the session of 1833, when *Mr. Preston* and *Mr. Wilbraham*, for the respondents, argued to the following effect, in support of the decree below:—

The most eminent conveyancers and text writers never doubted, as appeared from their drafts of settlement and published writings, that twenty-one years after a life or any number of lives in being, might be taken as an absolute term. If any man studied this subject more diligently than another, it was *Mr. Fearne*, who, on account of his profound study and knowledge of it, was more consulted than any man of his time. In his book on *Executory Devises*, he says, “this privilege of executory devises, which exempts them from being barred or destroyed, is the foundation of an invariable rule with respect to the contingency upon which an estate of

(a) 3 Dow, 194.

this sort is permitted to take effect, which is, that such contingency must happen within a short space of time, such as a life in being, and some few years after.” (a) Having then stated some decided cases, and among them the cases of *Lloyd v. Carew*, and *Marks v. Marks*, in illustration of the rule, Mr. Fearne adds, “the limitations in the last two cited cases were confined to vest within a certain number of months after the end of a life in being. But these are not the utmost limits for executory devises, for the Courts have gone so far as to admit of executory devises, limited to vest within a compass of twenty-one years after the period of a life in being;” (b) and again he says (p. 438), “more instances of the established limits of executory devises will be given in the sequel, &c., only I shall observe, in this place, that the law appears to be now settled, that an executory

* 400 *devise, either of a real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good, and this appears to be the longest period yet allowed for the vesting of such estates.” Mr. Butler, in his notes to these passages, examines recent decisions in support of the doctrines laid down; and it may be taken as a proof of his agreeing with Mr. Fearne, that he, after citing the words of Lord ALVANLEY, in *Theellusson v. Woodford*, adds, “But in the subsequent case of *Beard v. Westcott*, (c) it was held that an executory devise was good, though it was not to take effect till the end of an absolute term of twenty-one years after a life in being, at the death of the testator, without reference to the infancy of the person who was to take.” In his and Mr. Hargrave’s edition of Coke upon Littleton, in commenting upon the *Duke of Norfolk’s Case*, he says, (d) “The next advance in limitations of this nature was, to extend them to a period within the compass of one or more life or lives in being, and twenty-one years after.” That was the opinion of Mr. Butler, writing to the public; he also was much consulted in this branch of legal learning, and he had the largest collection of manuscript precedents of any man

(a) P. 429.

(b) P. 431.

(c) 5 Taunt. 393.

(d) 827 a. n. 2.

living, some of which contained limitations to the same effect. The same opinion was expressed by Mr. Sanders, in his book on Uses, (a) by Mr. Justice BLACKSTONE, (b) Mr. Woodderson, (c) and Mr. Cruise, (d) without any restriction or qualification as to the minority of any one. All the text-books have been examined, and not one passage is found in any one of them containing a contrary doctrine.

The Judges, the sages of the law, are as uniform as * the text writers in the assertion of the principles on * 401 which the decree of the Court below is founded. In the case of *Stanley v. Leigh*, (e) Sir JOSEPH JEKYLL enters into the doctrine of perpetuities, and what he there says is a sufficient answer to more than one of the objections made to the limitations in the present case. "Let us see," he says, "what a perpetuity is. A perpetuity, as it is a legal word, or term of art, is the limiting an estate, either of inheritance or for years, in such manner as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time after," &c. After showing the mischiefs arising from estates remaining a long time unalienable, he goes on to repudiate the old distinction in the doctrine of perpetuities between limitations of fee-simple and of terms of years, and cites, with approbation, what Lord NOTTINGHAM said on the same subject in the *Duke of Norfolk's Case*. "It is objected," he says (p. 690), "that the devisor intended a perpetuity, and such intention will make the limitations void. Supposing the devisor did intend a perpetuity, it would be very strange, if, for that reason only, the law should make those limitations void; for if they do not really tend to a perpetuity, the bounds which the law has set to devises or limitations for years are not transgressed, nor any of its rules violated; so that the intention is vain, and ought to have no operation at all." Most if not all of the cases cited and examined by the counsel for the appellant support the limitations of the will in the present case, and it therefore becomes material to examine them once more, and see

(a) P. 194, 4th ed.

(b) 2 Comm. 174.

(c) 2 Wood. 229.

(d) 6 Dig. 409-19-37.

(e) 2 P. Wms. 687.

what was the foundation of the decisions in them. Lord Chief Justice WILLES, in the case of *Goodtitle v.*

* 402 **Wood*, says, that "of late years the doctrine of executory devises has been settled; they have been considered, not as possibilities, but as certain estates and interests, and resembled to contingent remainders in all other respects, only they have been put under restraints, to prevent perpetuities; as first, it was held that the contingency must happen within a life in being, &c.; and the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case, likewise, there is no danger of a perpetuity." (a) In the case of *Blandford v. Thackerall*, (b) Lord LOUGHBOROUGH, then Chancellor, in his judgment, says, that the wisdom of the law has fixed the time (of suspension), which is twenty-one years after lives in being; up to that time you may have as many springing uses as you please. You may give a legacy to the grandson of A. born in the life of A. It is a good description of the legatee, and he would take within twenty-one years after the life of the person in being. The rule of law admits of fourteen years (the period of suspension in that case) after the termination of lives in being, and goes to twenty-one years. The rule continued to be so understood in Mr. Justice BULLER's time; and he, in the case of *Thellusson v. Woodford*, (c) says the rule, allowing any number of lives in being, a reasonable time of gestation, and twenty-one years, is now the clear law, that has been settled and followed for ages, and we cannot shake that rule without shaking the foundation of the law. The same learned Judge, in another part of his judgment in the same case, observes, (d) that "the number of contingencies is not material, if they are to happen within the limits allowed by law, &c. The twenty-one years are allowed because

* 403 the law considers that time *reasonable." Lord ALVANLEY, in delivering his opinion in the same case, (e) says, that "by the *Duke of Norfolk's Case* it was clearly decided that every executory devise is good that does not

(a) Willes, 213.

(b) 2 Ves. Jr. 241.

(c) 4 Ves. 319.

(d) Id. p. 326.

(e) 4 Ves. 331.

tend to a perpetuity, the meaning of which is, that every executory devise is good that does not tend to make an estate unalienable beyond the period allowed by law as to legal estates, which could not be protected beyond the time at which the remainder-man, who was not in existence at the time of the limitation of the estate, would arrive at the age of maturity." A little further on is the passage on which so much reliance is placed on the other side. It is this: "As to the period of twenty-one years, &c., nor, with submission to the learned Judge (BULLER), who immediately preceded me, has it ever been considered as a term that may at all events be added to such executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives in being, and twenty-one years, merely because a life may be an infant, or *en ventre sa mere*." Was it fair in that learned Judge to utter such a statement in the face of so many authorities to the contrary? Could he have read Mr. Butler's or Mr. Fearne's books? The reporter ought not to have taken notice of such a *dictum*.

[THE LORD CHANCELLOR.—Do you think, *Mr. Preston*, that a reporter has a right to supply or suppress any part of a judgment?

Mr. Preston.—I think a reporter has a discreet duty to perform; and if I were the reporter of that case, I would not give that part of Lord ALVANLEY's opinion.]

The next case cited against us is that of *Jee v. Audley*, (a) which was decided by Lord KENYON, then Master of the Rolls, and the most profound property * lawyer of * 404 his time. He and Lord ASHBURTON used to compare notes of cases and decisions. They were both bred in the same way, one with his father, a solicitor at Ashburton, the other also in a solicitor's office. He observes, in his judgment in that case, that "the limitations of personal estates are void, unless they necessarily vest within a life or lives in being, and twenty-one years, or nine or ten months afterwards.

(a) 1 Cox, 324.

This has been sanctioned by the opinion of Judges of all times, from the time of the *Duke of Norfolk's Case* to the present. It is grown reverend by age, and is not to be broken in upon." Next comes the case of *Roe v. Jeffery*, (a) in which Lord KENYON, then Lord Chief Justice, in delivering the opinion of the Court of King's Bench, says, "Nothing can be clearer in point of law than that, if an estate be given to A. in fee, and by way of executory devise, an estate be given over, which may take place within a life or lives in being, and twenty-one years, and the portion of a year afterwards, the latter is good by way of executory devise." Lord ELDON, in the case of *The Countess of Lincoln v. The Duke of Newcastle*, (b) on appeal in the House of Lords, says, "If the limitation had been to such son, at the age of twenty-one, as would be entitled to the trust in possession of the real estates, as the son must attain the age of twenty-one within twenty-one years after the expiration of the life of his father, allowing the period of gestation, that limitation would be within the limits permitted to executory devise." His Lordship, giving his judgment as Lord Chancellor, in the case of *Griffiths v. Vere*, (c) more than once expresses himself to the effect, that by executory devise an estate may be prevented from vesting for a life or lives in being and twenty-one years, with

* 405 an addition at the end * for the period of gestation.

That was the settled law before the case of *Long v. Blackall*, in which it was settled, that a period for gestation might be allowed, both at the beginning and end of the term. In no case has Lord ELDON, or any other Judge, except Lord ALVANLEY, said that the term was to be taken with reference to infancy. The next case of authority was that of *Beard v. Westcott*. (d) The marginal note to the report of that case may mislead, and therefore the case itself, and the certificates from the Courts of Common Pleas and King's Bench, must be looked to. The Judges of the Court of Common Pleas, who certified in the first argument, were Sir JAMES MANSFIELD, Mr. Justice LAWRENCE (both complete on this subject), Mr.

(a) 7 T. R. 589.

(b) 12 Ves. 232.

(c) 9 Ves. 132, 134.

(d) 5 Taunt. 394; 5 B. & Ald. 801.

Justice HEATH, who had been a conveyancing counsel, and answered numbers of cases, and Mr. Justice CHAMBRE. Sir VICARY GIBBS, who succeeded Mr. Justice LAWRENCE on the Bench, heard the second argument, and signed the second certificate. Lord ELDON sent the case afterwards to the Court of King's Bench, and the certificate of the Judges there is reconcilable with those sent by the Court of Common Pleas, and with all the authorities, and with the principle for which we contend in this case. The unprepared expression of Lord ALVANLEY has not availed to discourage conveyancers from inserting in devises a term of twenty-one years, without reference to infancy. Upon the authority of the cases already cited, and of several others equally applicable, it is submitted, that no estate or interest given by this will is open to the objection of transgressing the rules of law against perpetuities. The period of accumulation is restricted to a term of twenty-one years, from the testator's death, and an accumulation during that period is warranted by the rules of law, and is consistent with the provisions of the *stat- * 406 ute. (a) Every contingent or future interest given, is so limited, that it must vest, or fail of effect, within twenty years from the death of the survivor of the lives in being at the date of the will. The rule of law against perpetuities allows, as has been shown, of a suspense of the time of vesting for a life or lives in being, and a further period of twenty-one years, and in some cases for a period and even two periods of gestation, in addition. As the rule of law is not transgressed, but its limits are observed by the testator, no argument of fraud on the rule, or of inconvenience, from the application of the rule, is entitled to any weight in a court of justice. It is the province of the legislature, and not of this House, sitting as a Court of justice, to reform the law, if it admits of an inconvenience. If your Lordships were to legislate anew on this subject, no man could frame a new rule to be substituted for the one which is established by the wisdom of ages, which is a fair deduction from reason and authority, and productive of no mischief whatsoever.

The rules of law relating to property are simple, and may

(a) 39 & 40 Geo. 3, c. 60.

be easily learned, if they be adhered to, and not altered ; it is when they are not adhered to that the difficulty in learning them arises. The argument against this will is, that it is a fraud on the rules of law ; the same arguments were used against Mr. Thellusson's will. An Act of Parliament was passed to restrain accumulation to twenty-one years. The period for accumulation in that Act is adopted in this will. The limitations after that period for a number of lives in being, and twenty years afterwards, is no fraud on the law, because the law allows even twenty-one years. There can be no objection to the number of lives ; and if the limitations were confined to them, there would be no question of their validity. The objection to Thellusson's will was not to * 407 the number of lives, which * were nine, but to the accumulation ; so the objection here is not to the number of lives, but to the additional term of years. A testator may multiply lives as he pleases ; may take all the lives of this House, and secure the certainty of a longer period for the suspension of the estate than the addition of twenty years to twenty-eight lives. While *Heath v. Heath*, and other cases already commented on, remain in the books unimpeached, it is absurd to say that the term must have reference to the minority of the person who is to succeed to the estate, or of any other person.

Besides the cases mentioned, the learned counsel cited and commented on those of *Sommerville v. Gutteredge*, *King v. Cotton*, *Wilkinson v. South*, *Massenburgh v. Ashe*, *Kirby v. Fowler*, *Sheffield v. Lord Orrery*, *Gulliver v. Wickett*, *Goodtitle v. Wood*, and *Long v. Blackall*, all which were before referred to by the appellant's counsel.

Sir Edward Sugden, in reply. — My learned friends have not removed my objection to this will, which is, that it is a fraud on the rules of law. The object of the testator was, to provide life-estates for every member of his family ; but he desired to attain that object by cutting down other estates, and substituting one which is unknown to the law of England. The interests first given are all chattel interests, depending

upon the lives of twenty-eight persons, who may be scattered all over the world, so that the person, who may take a vested interest in the freehold cannot know when his estate arises. If any of your Lordships were to make his will, he would begin with a limitation for life, with which this testator ended. My friends are not correct in saying, that Mr. Butler considered this question, as to the term in gross, concluded.

Your Lordships, on looking into Mr. * Butler's last * 408 edition of Mr. Fearn's book, will find several notes on .

what fell from Lord ALVANLEY, in the case of *Thellusson v. Woodford*, which show that Mr. Butler considered that point still open. The law raises no objection to estates granted in perpetuity, provided there be a power to bar or destroy them, so as to render them alienable, and of that nature were the leases and conveyances referred to by my learned friend. The authority of the late Mr. Cruise was cited in support of the validity of these limitations. I deny that his text can be so interpreted, but although I esteem his book, I must say that he never lays down a proposition in such a way as justifies any one to rely on it. I do not find fault with Mr. Justice BLACKSTONE, who merely lays down a general rule, without adding whether the term of twenty-one years is to be taken in gross, or with reference to minority. What Mr. Woodeson says of the term of twenty-one years is equally vague and undefined. I have a better right to conclude from the text, that both these commentators contemplated the case with reference to minority, than my friends have to draw the contrary inference ; for whenever you mention a life or lives, and twenty-one years, you speak of the years with reference to minority, and it is not only twenty-one years you mean, but twenty-one years and some uncertain number of months in addition, both for infancy and gestation. My friends have said, that in the case of *Long v. Blackall*, (a) Lord KENYON, and Lord ELDON afterwards, in *Beard v. Westcott*, expressed themselves to the effect that the term may be taken absolutely. I cannot find any such opinions. The latter case, after it was argued in the King's Bench, came before Lord ELDON, Chancellor, on further directions, upon the certificate of that

(a) 7 T. R. 100.

* 409 Court, * and what Lord ELDON there says, as stated in the report, (a) is clearly in favour of my proposition. Lord KENYON and Lord MANSFIELD are also with me, and so is Lord ALVANLEY. My friend says, that if he were the reporter, he would not report the *dictum* of Lord ALVANLEY. Then it is well for the laws of England, in more senses than one, that my friend was employed otherwise than in reporting. Is a reporter to set down his own reasons instead of those of the Judge, and set himself above all the Judges? Lord ALVANLEY, apprehensive that what Mr. Justice BULLER said, in giving his judgment in *Thellusson v. Woodford*, might be understood as having the deliberate concurrence of the Court, set himself right as to the rule of law, by saying, "As to the period of twenty-one years, it has never been considered as a term that may, at all events, be added to an executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant's, or *en ventre sa mere*." (b) That is the doctrine that is laid down in *Routledge v. Dorell*, (c) the judgment in which was long delayed, and carefully considered. Lord ALVANLEY's opinion is entitled to the greatest respect and attention. My friends say that the rule, according to their interpretation, has been established since the *Duke of Norfolk's Case*. But there was no suspense there except during a life in being; there was no term for years added.

Sir Edward Sugden again stated some of the cases already referred to, and more particularly those of *Lloyd v. Carew*, *Marks v. Marks*, *Massenburgh v. Ash*, *Gore v. Gore*, *Heath v. Heath*, and *Stanley v. Leigh*, no one of which, he * 410 insisted, was against the * rule, as he understood it; some were within it; some did not try it at all, and from others of them no notion could be inferred that any number of years could be added; but the addition of some months only, for the period of gestation, was formerly considered by some Judges too much after the death of the

(a) 1 Turn. & Russ. 25.

(b) 4 Ves. 327.

(c) 2 Ves. Jr. 207.

parent. No case carried the indulgence farther than that of *Lloyd v. Carew*, and any attempt to extend it ought to be resisted. A period of not less than ninety years, on the most moderate calculation, must elapse after the death of the testator, before any estate can vest. Did any one ever think of such a suspension; whereas formerly a few months were considered too long? The suspension of these estates for so long a period is against the policy of the law, and the power given here to convert a chattel interest into an estate for life, shows clearly that this was an attempt to evade the rules of law, an attempt which ought not to be favoured. Then, upon the assumption that this term of twenty years is against the law, the question arises, whether all the limitations are not void? I think they are; for part of them cannot be held good if part be bad. The rule laid down is this: where some of the limitations go beyond the period allowed by law, the whole are void. *Fox v. The Bishop of Bath and Wells*, (a) *Leake v. Robinson*. (b) You cannot remodel this estate. There was never such an attempt to establish a perpetuity; and I call on your Lordships, in the words of Lord NOTTINGHAM, to stop when so manifest an inconvenience arises.

The Lord Chancellor, after suggesting that he should be glad of the assistance of the counsel in framing questions for the learned Judges, in order to dispose effectually of this question, moved to postpone the further consideration of the case; which was agreed to.

* The learned Judges who attended were Justices * 411
A. PARK, LITLEDALE, GASELEE, BOSANQUET, ALDERSON,
J. PARK, and TAUNTON; BARONS BAYLEY, VAUGHAN, BOLLAND,
and GURNEY; and the following were the questions submitted to them:—

First, Whether a limitation, by way of executory devise, is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the

(a) 2 H. Black.

(b) 2 Meriv. 363.

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infancy of any person who is to take under such limitation, or of any other person.

Secondly, Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with a number of months equal to the ordinary period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*.

Thirdly, Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the longest period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*.

Judgment. June 25th.

The learned Judges attended again on a subsequent day, and Mr. Baron BAYLEY delivered their opinion as follows: first, in answer to the first question: — I am to return to your

Lordships the unanimous opinion of the Judges who
* 412 have heard the argument at your Lordships' * bar, that such a limitation is not too remote, or otherwise void.

Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd v. Carew*, (a) in the year 1696, and *Marks v. Marks*, (b) in the year 1719, established the point, that for certain purposes, such time as, with reference to those purposes, might be deemed reasonable, beyond a life or lives in being, might be allowed. The purpose, in each of those cases, was, to give a

(a) 1 Show. P. C. 137.

(b) 10 Mod. 419.

third person an option, after the death of a particular tenant, to purchase the estate; and twelve months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your Lordships' bar; they do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being is not the limitation; that there are cases in which it may be exceeded. *Taylor v. Biddal*, (a) 1677, is the first instance we have met with in the books, in which so great an excess as twenty-one years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Warton, and their heirs, as they should attain the respective ages of twenty-one; there might be an interval, therefore, of twenty-one years between the death of Robert, till which time no one could be heir of his * body, and the period when such heir should * 413 attain twenty-one, till which time the estate was not to vest: and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by, and was the foundation of, the decision in *Stephens v. Stephens*. (b) That was a case of infancy also. The executory devise there was, "to such other son of the body of my daughter, Mary Stephens, by my son-in-law, Thomas Stephens, as shall happen to attain the age of twenty-one years, his heirs and assigns for ever;" and the Judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar; it refers to *Taylor v. Biddal*, and says, "that however unwilling they might be to extend the rules laid down for executory devises beyond the rules generally laid down by their predecessors, yet, upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years; and, considering that the power of alienation would not be restrained longer

(a) 2 Mod. 289.

(b) Cas. temp. Talb. 232.

than the law would restrain it, viz., during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity; and considering that such construction would make the testator's whole disposition take effect, which otherwise would be defeated; they were of opinion that that devise was good by way of executory devise." This also was a case of infancy; it was on account of that infancy that the vesting of the estate was postponed; and though, under that limitation, the vesting of the estate might be delayed for twenty-one years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would; and it might

* 414 vest at a much earlier period. * These decisions, therefore, do not distinctly or necessarily establish the position, that a term in gross for twenty-one years, without any reference to infancy, after a life or lives *in esse*, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy; the contemporaneous understanding might have been, that it extended generally to any term of twenty-one years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle v. Wood*, (a) Lord Chief Justice WILLES discusses shortly the doctrine of executory devises, and notices their progress of late years. He says: "The doctrine of executory devises has been settled; they have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints, to prevent perpetuities. At first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, viz., to a child *en ventre sa mere*, at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to twenty-one years after the death of a person in being; as in that case, likewise, there is no danger of a perpetuity." And in citing this passage in *Thellusson v. Wood-*

(a) Willes, 213; S. C., 7 T. R. 103 n.

ford, (a) Lord Chief Baron MACDONALD prefaces it by this eulogium: "The result of all the cases is thus summed up by Lord Chief Justice WILLES, with his usual accuracy and * perspicuity." He does, indeed, afterwards say, (b) * 415 after noticing *Long v. Blackall*, (c) "the established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of the posthumous child;" and that rather implies that he thought the rule was confined to cases of minority. This opinion of WILLES, C. J., though not published till 1797, was delivered in 1740; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of twenty-one years after the death of a person *in esse*, without reference to any minority, had been allowed; and, though there be no such case reported, it does not follow that none such was decided. In *Goodman v. Goodright*, (d) is this passage, "Lord C. J. MANSFIELD, says, 'it is a future devise, to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being, and twenty-one years after,' which is the line now drawn, and very sensibly and rightly drawn." This was published in 1766; and, whether the last approving paragraph was the language of Lord Chief Justice MANSFIELD or the reporter, it was calculated to draw out some contradiction or explanation, if that were not generally understood by the profession as the correct limitation. In *Buckworth v. Thirkell*, (e) Lord MANSFIELD says, "I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being, and twenty-one years afterwards." In *Jee v. Audley*, (g) Lord KENYON (Master of the Rolls) says, "The limitations of personal * estate are void, unless they necessarily vest, if at * 416 all, within a life or lives in being, and twenty-one

(a) 1 N. R. 388.

(b) 1 N. R. 393.

(c) 7 T. R. 100.

(d) 2 Burr. 879.

(e) 3 Bos. & Pul. 654 n.; S. C., 10 B. Moore, 238 n.

(g) 1 Cox, 325.

years, or nine or ten months afterwards. This has been sanctioned by the opinion of Judges of all times, from the *Duke of Norfolk's Case*, (a) to the present time; it is grown reverend by age, and is not now to be broken in upon." In *Long v. Blackall*, (b) the same learned Judge says, "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations; and the Courts have said that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common-law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail; and until the person, to whom the last remainder is limited, is of age, the estate is unalienable. In conformity to that rule, the Courts have said, so far we will allow executory devises to be good." And, after referring to the *Duke of Norfolk's Case*, he concludes, "It is an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being, and twenty-one years, and the fraction of another year, allowing for the time of gestation." In *Wilkinson v. South*, (c) Lord KENYON says, "The rule respecting executory devises is extremely well settled, and a limitation, by way of executory devise, is good, if it may (I think it should be, must) take place after a life or lives in being, and within twenty-one years, and the fraction of another year afterwards." We would not wish the House to suppose, that there were not expressions in other cases about the same period, from which it might

* 417 clearly be collected, that * minority was originally the foundation of the limit, and to raise some presumption that the limit of twenty-one years after a life in being was confined to cases in which there was such a minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion, that it was at length extended to the enlarged limit of a life or lives in being, and twenty-one years afterwards. It is difficult to suppose, that men of such discriminating minds, and so much in the habit of dis-

(a) 3 Chan. Ca. 1.

(b) 7 T. R. 102.

(c) 7 T. R. 558.

crimination, should have laid down the rule, as they did, without expressing minority as a qualification of the limit, particularly when, in many of the instances, they had minority before their eyes, had it not been their clear understanding, that the rule of twenty-one years was general, without the qualification of minority. Mr. Justice BLACKSTONE, in his Commentaries, (a) puts as the limits of executory devises, that the contingencies ought to be such as may happen within a reasonable time, as within one or more lives in being, or within a moderate term of years; for Courts of justice will not indulge even wills, so as to create a perpetuity. The utmost length that has been hitherto allowed for the contingency of an executory devise, of either kind, to happen in is, that of a life or lives in being, and twenty-one years afterwards; as, when lands are devised to such unborn son of a *feme covert* as shall first attain twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest is, the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise. Mr. Fearn, in his elaborate work upon Executory Devises, lays down the rule in the same way: "An executory devise, to vest within a short time after the period of a life in being, is good;" as * in *Lloyd v. Carew*, * 418 which he states, and *Marks v. Marks*; and he says, "The Courts, indeed, have gone so far as to admit of executory devises, limited to vest within twenty-one years after the period of a life in being;" as in *Stephens v. Stephens*, *Taylor v. Biddal*, *Sabbarton v. Sabbarton*, (b) all of which he states, and in all of which the vesting was postponed on account of minority only; and then he draws this conclusion, "That the law appears to be now settled, that an executory devise, either of a real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates." The instances put, all instances of minority, might certainly have suggested that it was in cases of minority only that the

(a) 2 Bl. Com. (16th ed.) 174.

(b) Cas. temp. Talb. 55, 245.

twenty-one years were allowed; but, by stating it generally, as he did, he must have considered twenty-one years generally, independently of minority, as the rule. The same observation applies to Mr. Justice BLACKSTONE. That such was Mr. Fearne's understanding, may be collected from many other passages in his book; but from none more distinctly than in the third division of his first chapter on executory devises, (a) where, after having mentioned as the second sort of executory devises, those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee, and after putting several instances, he then concludes the division thus: "And the case of a limitation to one for life, and, from and after the expiration of one day (or any other supposed period, not exceeding twenty-one years, we may suppose), next ensuing his decease, then over to another, may be adduced as an instance of the call for the latter part of the extent to which I have opened the

* 419 *second branch of the general distribution of executory devises." And in his third chapter, (b) he begins his eighth division with this position: "It is the same (that is, that an executory devise is not too remote) if the dying without issue be confined to the compass of twenty-one years after the period of a life in being." And in the eighth division of the fourth chapter (c) he says, "It seems now to be settled that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding limitations which would carry the whole interest happens to vest." The opinion of Mr. Fearne is continued in the different editions, from the period when his work was first published, in 1778, down to the present time; but, upon that expression which occurs in *Thellusson v. Woodford*, (d) showing that a doubt existed in the mind of Lord ALVANLEY, that doubt is introduced into a subsequent edition, for the purpose of consideration; but it does not appear to me, from any

(a) 9th ed. 399, 401.

(b) P. 470.

(c) P. 517.

(d) 4 Ves. 387.

thing expressed by his great and experienced editor, or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule; but, instead of that, he seems to have intimated, that his opinion was in conformity with it; because he gives extracts from what Mr. Hargrave, who agrees with Mr. Fearne, had said upon the subject, as if the inclination of his opinion was that Mr. Fearne was right, and that the unqualified rule of twenty-one years was correct. At length, in *Beard v. Westcott*, (a) the question, whether an executory devise was good, though it was *not to take effect till the end of an *420 absolute term of twenty-one years after a life in being at the death of a testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir W. GRANT, the then Master of the Rolls; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated; and, lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that Court. The first certificate was in November, 1812; the next in November, 1813; and the Judges who signed them were Sir JAMES MANSFIELD, Mr. Justice HEATH, Mr. Justice LAWRENCE, Mr. Justice CHAMBRE, and Mr. Justice GIBBS, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord ELDON to the Court of King's Bench, and that Court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote; but the foundation of their certificate was, that a previous limitation, clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity exist-

(a) 5 Taunt. 893.

ing in the preceding limitation ; and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion on that, I am unable to say. I think

the Court of King's Bench would have taken much
* 421 more time to consider that point * than they did, and

have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas ; but, when it became totally immaterial, in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at, that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Court of Common Pleas, in *Beard v. Westcott*, and the *dicta* by L. C. Justice WILLES, Lord MANSFIELD, and Lord KENYON, and the rules laid down in Blackstone and Fearn, we consider ourselves warranted in saying that the limit is a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever. This will certainly render the estate unalienable for twenty-one years after lives in being, but it will preserve in safety any limitations which may have been made upon authority of the *dicta* or text writers I have mentioned ; and it will not tie up the alienation an unreasonable length of time.

Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*, the unanimous opinion of the Judges is, that such a limitation would be void, as too remote. They consider twenty-one years as the limit, and the period of

gestation * to be allowed in those cases only in which * 422 the gestation exists.

THE LORD CHANCELLOR. — I shall move your Lordships to concur in the opinions expressed by the learned Baron, as the unanimous resolutions of the Judges. The two last questions were put with a view to comprehend more fully the question argued at the bar, and to see the origin of the rule. That rule was originally introduced in consequence of the infancy of parties; but whatever was its beginning, it is now to be taken as established by the *dicta* of the Judges from time to time. A decision of your Lordships in the last resort, assisted here by the then Chief Justice of the Common Pleas, in *Lloyd v. Carew*, (a) settled the rule; for the whole question was there gone into. Some doubt has been expressed as to whether this principal was adopted as the uniform opinion of conveyancers. It is impossible to read the passages read by the learned Baron from Mr. Fearne's book, without seeing that it was the settled opinion of that eminent person, that twenty-one years might be taken absolutely. The able editor of his book was of the same opinion, and Mr. Justice BULLER's opinion was stated by him and examined. Mr. Butler makes it a question of separate consideration, and treated the subject as Mr. Fearne had done. The opinion of Lord MANSFIELD was the same, and the doctrine is not weakened by what Lord KENYON is stated to have said in *Long v. Blackall*. (b) In the opinion of all, the rule was clearly confined to twenty-one years, as the period now understood. It was, however, necessary to state the first question, for the opinion of the Judges, and they have not shrunk from the consideration of it. It was also right to have put the other two questions, * to which * 423 the learned Judges also applied themselves, and they have excluded the period of gestation beyond the term of twenty-one years, except where the gestation actually exists. If your Lordships be of the same opinion, you will affirm the judgment of the Court below, and dispose of this case. The rule will then be, that a limitation will not be too remote, if

(a) 1 Show. P. C. 137.

(b) 7 T. R. 100.

the vesting be suspended for twenty-one years beyond a life or lives in being; but that beyond that period it would.

The judgment of the Court below was affirmed.

FROM THE COURT OF SESSION.

RALSTON AND ANOTHER *v.* ROWAT.

1833.

Mrs. ELIZABETH RALSTON, or ALISON, and	} <i>Appellants.</i>
ROBERT PURDON	
JOHN ROWAT	<i>Respondent.</i>

Evidence. Witness — interest of.

A witness cannot be rejected unless he has a direct and immediate interest in the result of the case in which he is called to give evidence, nor unless the verdict in that case can be given in evidence for him in another suit.¹

The rules of law in England and Scotland are the same on this subject.

THE appellants, having procured themselves to be served as heirs portioners of one John Allen, of Ellsrickle, deceased, proceeded as pursuers against the respondent as defender, in the form of an action of reduction, the object of which was, to set aside a deed of settlement, executed by the deceased, that disposed of his estates in favour of the defender. The pursuers relied on the allegation, that at the date of the execution of the deed the deceased was on his death-bed, a circumstance which, by the law of Scotland,

¹ By recent legislation in England, and by statute in many of the United States, the disqualification of a witness by reason of interest has been removed. See 1 Dan. Ch. Pr. (4th Am. ed.) 885, 886.

would render the deed void. (a) An issue was directed to try this question. The cause came on for trial before Lords Justices CLERK and MACKENZIE, when Dr. Robert Buchanan, a surgeon of Dumbarton, was * tendered as * 425 a witness on the part of the pursuers, and was objected to by the defender, on the ground of interest. This objection was raised when Dr. Buchanan had been examined on the *voire dire*, or, according to the terms of the Scotch law, *in initialibus*. When thus examined, Dr. Buchanan stated, that he had given notice to Mr. Rowat of his intention to dispute the deed; that he was a grandson of a Mrs. Macfarlane, a daughter of John Allan, and claimed through her; and that he considered himself the nearest heir to the deceased. The difficulty by which he had been stopped in making out his claim, arose from his not having been able to find the documentary evidence of John Allan's marriage; but Dr. Buchanan stated, that if he could supply that evidence, he considered he should have a better title than either of the pursuers, and that though he had not been served heir, he had not renounced his claim. It was insisted by the defender that Dr. Buchanan had an interest in the reduction of this deed, because it would leave him free to contest the question with the present pursuers alone, instead of having both to defeat their claim and then to reduce this deed; and that he could not be allowed to effect as a witness, what ought to be the matter of a separate suit between him and the defender. The Court sustained the objection, on which a bill of exceptions was, under the provisions of the 55 G. 3, c. 42, tendered by the pursuers. It was afterwards discussed before the Second Division of the Court, with the assistance of the Lord Chief Commissioner ADAM. (b) The judgment of the Court below was supported by the Lord Justice CLERK, Lord GLENLEE, Lord CRINGLETIE, and opposed by the Lord Chief Commissioner and Lord * MEADOWBANK. Against the judgment, thus affirmed, * 426 an appeal was brought in the House of Lords.

(a) Bell Dict. Art. *Death-bed*.

(b) See cases decided in the Court of Session, Feb. 27, 1833, No. 194, p. 451.

The Solicitor-General for the appellants. — The reason given for the rejection of this evidence was insufficient. It was supposed that if the pursuers obtained judgment for the reduction of the deed on the evidence of Dr. Buchanan, that judgment would be conclusive in his favour. That was a mistake. The judgment, under such circumstances, could not be set up as *res judicata*. Lord CRINGLETIE, who was one of the Judges that affirmed the first judgment, did not proceed on that ground: he said distinctly that this judgment could not be set up by Dr. Buchanan in his own favour, but that it might be argued against him as a personal exception; that as he had admitted the title of others as heirs, and had come as a witness in their favour, he could not afterwards set himself up as the true heir, and so insist on reducing the death-bed deed. Now that point was totally beside that on which the Jury Court rested in rejecting the witness. The only thing that appeared to be a difficulty in the case was, that the reduction of a deed was by the law of Scotland a proceeding *in rem*; so that the deed, being once reduced, might perhaps be considered as for ever extinguished. There had, however, been no authority to show that such would be the effect of this proceeding, and it was impossible that the judgment in this case could be conclusive in favour of Dr. Buchanan in any suit afterwards brought by him against Rowat.

Mr. M'Neill and *Mr. Follett*, for the respondent. — This case did not depend on the rules of evidence, as administered in this country, but upon the question of those rules, as * 427 existing in the law of Scotland; upon the * character of the pursuers as the heirs of the deceased, and the consequent results of that character. This was an action for reducing and setting aside a deed executed by the late Mr. Allan. It was challenged on a ground peculiar to the law of Scotland, namely, that of death-bed. The party who was once served heir, was invested with that character till some nearer heir appeared. The defender could not dispute that character with the pursuers, because he did not claim to be heir-at-law; his title rested on a totally different ground.

With regard to the admission of evidence, it was to be observed that there was a marked difference between the law of England and the law of Scotland on this point. The former tended to the admissibility of a witness, leaving him open to observations as to his credit; but that was not the law of Scotland. If the verdict was in favour of the pursuer, the deed would be reduced, and that deed would then be extinguished for ever. The interest of Dr. Buchanan then was manifest, for if he could extinguish the deed, he would only have to prove himself nearer heir, and would succeed to the property at once. The only difficulty in his way was the want of documentary proof to establish the legitimacy of his grandmother; but her illegitimacy was not to be presumed. Though the respondent could not show any rule of the law of Scotland by which a deed, when once reduced, was extinguished for ever; no instance had ever been known in which a deed once reduced had been allowed to be revived. The judgment here would be binding in any future suit. In the case of *Rutherford v. Sir J. Nesbitt's Trustees*, (a) the Court held that a judgment against the trustees was binding upon Nesbitt. The same principle was recognized in *Badell v. Ogilvy*. (b) It was not necessary that the verdict should *be binding upon each of * 428 the two opposing parties. By the law of Scotland a party whose interests were injured by a murder, might maintain a civil action for damages, called an action of assythment, against the murderer. In such an action it had been held, that the verdict finding the prisoner guilty of the murder might be conclusive against him, but the verdict acquitting him of the murder would not be conclusive in his favour, as against the demand for reparation in damages. That was the case of *M'Harg v. Campbell*. (c) If a man was acquitted on a charge of arson, that verdict would not be conclusive against the insurers, but an opposite verdict would be conclusive against the claimant. *Carr v. Surr*. (d) The reason for the distinction was, that in the latter case the party to be bound had been heard, in the other he had not.

(a) Shaw & D. 27th Nov. 1832

(b) Morrison, 14074.

(c) 24th Feb. 1767; Morrison, 12541.

(d) Morr. 14078.

A judgment in favour of an executor or heir, on the question whether he was the representative of the deceased, in an action founded on a claim against the ancestor, would not be conclusive as against a second creditor; but an opposite judgment would be conclusive against the heir or executor. This was a deed set up against the interest of the heir-at-law; any person, therefore, who claimed as heir, had a direct interest in setting aside the deed. This action was brought by the only person at that time entitled to bring it. Dr. Buchanan could not bring it at that time, for he had not then been served as heir-at-law, but he asserted that he was the real heir, and that he intended to set up his claim as such for the recovery of the estate. That being the state of the facts, Dr. Buchanan was called as a witness, to give material evidence against the deed. He claimed the estate. Between

him and the estate stood, first the persons who now
 * 429 * claimed as heirs, and next the deed. Before he
 could make good his claim, he must get rid of both.

According to the English law, a witness was not incompetent unless he had a direct interest in the particular suit, and therefore the argument on the other side had proceeded in a great measure on the question, whether Dr. Buchanan could afterwards use this judgment in his favour. That, however, was not the law of Scotland. In England, in the case of commoners prescribing for rights, one commoner was a witness for another. Tait on Evidence (a) showed that that was not so in Scotland. "Thus, if the tenant of a mill, having a right of thirlage, have raised processes for abstracted multures, against the different tenants of the barony, though in point of form these different actions are separate and independent, no one defender seems to be a competent witness for another, as far as their defences are connected, as he must see the influence which his deposition must have on his own cause." By the law of Scotland, relatives are sometimes not witnesses for each other; yet by the law of England they would be. Yet, although this case should be held to be governed by the law of England, still it was clear that Dr. Buchanan was not admissible, for he had a direct interest

(a) P. 363.

in the case. What would be the effect of the verdict? If it was for the pursuer, for whom Dr. Buchanan was called, it would put the pursuer into possession of the land. If Dr. Buchanan should afterwards be able to make out his pedigree, he would have an action against the party then in possession of the land, and he would have nothing to do but to prove that pedigree, and he must get the property. He need not again set aside this deed. A question might then arise, whether the present respondent could not bring an * action against Dr. Buchanan; but, in the mean * 430 time, the latter would have got possession of the estate. That was an interest which the law would recognize. In an action of ejectment here, the tenant in possession was not a witness for the defendant; and why? Because his possession might be disturbed by a verdict for the plaintiff. So that this mere contingent interest was admitted as a sufficient ground to disqualify him. The case of Dr. Buchanan was still stronger. This deed was one stop between him and his taking possession, and that stop he was by his own evidence to remove. Again, there were now two persons with whom he might have to contend upon different questions of title for the possession of this estate: if his evidence was admitted, he would for ever get rid of the title of one of them. Could it be said that that was not an interest sufficient to make him an incompetent witness. In Phillips on Evidence, (a) the matter was thus stated, "The reason why a verdict is not evidence against a person who was neither a party to the former suit, nor claims under one of the parties, is, because he had no opportunity of calling witnesses, or cross-examining those on the other side, nor of appealing against the judgment. And the reason why the verdict would not be evidence for a stranger, even against a party who was engaged in the former suit, seems to be, because if he had been a party to that suit, instead of the person who gained the verdict, the result might have been different; for as the parties would, in that case, have been constituted differently, the evidence might have varied; part of the evidence might then have appeared inadmissible, or of

(a) 4th edit. vol. 1, p. 8202.

a doubtful character, or perhaps other evidence might have been produced by the party who lost the verdict.

* 431 Under such circumstances * to admit a verdict as evidence, would be giving a party indirectly the benefit of testimony, which he might be precluded from availing himself of directly in his own suit. But this reason, it is evident, only applies where the verdict is offered in evidence by a third person, against the party who failed in the former action, and not where it is produced against the party who succeeded." Here there was no distinction, so far as the respondent was concerned, between the pursuer and the witness, for both desired to set aside the deed; they had a common interest in that respect. It was clear, therefore, that, having such an interest, the evidence of Dr. Buchanan was inadmissible.

The Solicitor-General, in reply, admitted that by the law of Scotland, parents and children, and brothers, were not witnesses for each other, and that the rule went on the ground of family affection, arising from ties of blood; but in other respects there was no difference between the law of evidence in England and Scotland. Dr. Buchanan had no immediate interest in the pursuer's getting possession of the estate. In any subsequent proceeding he must prove his pedigree and all other necessary things, before he entitled himself to the estate. The cases cited had no application. In *Rutherford v. Nisbett*, the man who sought to try the question over again, was the representative of him who had tried it before, and was therefore bound by the decision against the person under whom he claimed. The words of Lord STAIR were therefore applicable to him, namely, (a) "that *res judicata* is relevant, not only being a decret between

* 432 the pursuer and defender, but it is * sufficient if it was between their predecessors and authorities." The same doctrine was laid down by Lord BANKTON. (b) The parties in this case, however, stood in no such relation to each other, and that reasoning, therefore, did not apply here. With regard to direct interest, the Lord President agreed,

(a) Bk. iv. tit. 40, § 16.

(b) Bk. iv. tit. 25, § 7.

that if this proceeding could be set aside, the whole question of death-bed would immediately be raised anew, so that the effect would be, that the witness would neither gain nor lose by his evidence; and Lord CRINGLETIE distinctly expressed himself that this proceeding could be set aside, for he said, that "as no man can reduce on the ground of death-bed, but the immediate heir, the proceedings in this case must necessarily fall, as having been at the instance of a party who had no right whatever to insist on them;" and for another cause he expressed his belief, that it would probably be better for Dr. Buchanan that things should remain as they were, adding, that the first thing he would have to do would be, to get himself served heir, and then reduce the deed. It was clear, therefore, even on the opinion of one of the Lords of Session who had supported the judgment of the Court below, that the witness could have no interest in reducing the deed, and consequently, his testimony should have been admitted, and the judgment rejecting it must be reversed.

Judgment. Wednesday, July 10.

Lord WYNFORD moved the judgment of the House. — This was what was called in the Scotch law, an action of reduction and improbation, for the purpose of setting aside a deed that had been executed in favour of the respondent. The grounds for the reduction of the deed were two. First, that the deed was not executed *in the proper manner; * 433 and next, that at the time of the execution of the deed, John Allan was on his death-bed. For the purpose of proving these two facts, a witness, named Buchanan, was called; he was examined on the *voire dire*, as it was called in the English, or *in initialibus*, as it was termed in the Scotch law. This was with the view of objecting to his testimony. Upon the statement he then made, it appeared that he claimed the estate of John Allan, as the nearest heir of that person; but that his claim was suspended for the present in consequence of a difficulty in making out the title by proving the legitimacy of his grandmother; on this it was insisted that Dr. Buchanan could not be examined as a witness, because his statement showed he had an interest in the cause.

It was clear that he could not proceed in any claim founded on his supposed nearness of relationship, till this difficulty about the legitimacy of his grandmother had been removed. Two learned Judges, however, sustained the objection; he was not examined; and the pursuer failed in his suit. Upon this, the counsel for the pursuer tendered, under the provisions of a statute which assimilated the laws of England and Scotland to each other, a bill of exceptions. The question then came to be considered before the Court of Session, and by that Court Dr. Buchanan was held not admissible as a witness. It was satisfactory to know that that judgment had not been unanimously given. The Lord Chief Commissioner ADAM, whose opinion was taken though he had not a right to vote upon the subject, was opposed to it. Lord MEADOWBANK was also opposed to it. Thus stood the case in point of authority. The greatest respect was due to the learning and ability of the Judges in Scotland; but when they thus differed among themselves, he was inclined,

* 434 on questions of the *admissibility of evidence, to prefer the authority of a lawyer like the Lord Commissioner, who had had the benefit of the experience afforded in such matters by a practice in the Courts of England, where questions of admissibility of evidence had been much more frequently discussed. If the question was to be settled entirely by English law, there was not a man in Westminster Hall who could entertain a doubt upon it. It had been a settled rule here since the case of *Walton v. Shelley*, (a) to incline against the doctrine of incompetency, and for that of admissibility, and that no objection of incompetency should be received unless the witness was directly interested; in other words, unless the record in the case in which he was called as a witness, could be used for him in another suit. A man who was heir-at-law to another, could be called to prove his father's right to an estate, though the instant the breath was out of his father's body he would enter as heir. On what principle was it that such a witness could be admitted? On the principle that he had no vested interest in the cause, which he could immediately use, for *nemo est*

(a) 1 T. R. 296.

heres viventis. That was a stronger case than the present, which was at most only one of a contingent interest. Had this been a question in an English Court of justice, the witness would have been admitted, subject, of course, to any objections to his credit. The question here need not, however, be argued on the point of the existence of a contingent interest, for the judgment would not have been of the least use to the witness. There was no great difference in this respect between the laws of the two countries. The rule in both was, that interest in a cause made a witness inadmissible. * Could this judgment be used in favour of, * 485 or against the person? The rule in both countries was the same, that the judgment in a case could only be used between the same parties, and that rule was subject but to few exceptions. These consisted of cases where the persons to be affected were privies in estate, taking under the parties to the original suit. It was clear that the witness did not stand in this situation, for instead of being privy to the estate of the pursuer, or taking under the pursuer, he would, if he came in, treat the pursuer as an intruder. Lord STAIR said, "The first and most common exception in all processes is, *exceptio rei judicatæ*, that the controversy is already decided by a competent judge, which is relevant, albeit it would be a decret of an inferior Court, which, if it have no evident nullity, is relevant till it be reduced. Neither is the nullity a reply, but an objection arising from what appears in the decret; for if it be a nullity arising from the process and minutes, it cannot be insisted in till these be called for and produced in a reduction. *Res judicata* is relevant, not only being a decret between the pursuer and the defender, but it is sufficient if it was between their predecessors and authors."

Lord BANKTON also says, "This exception lies where the case that was formerly judged between the parties and their authors, is sought to be judged again, while that judgment remains unreversed, for it cannot be brought under cognizance again, the rule being, that *res judicata pro veritate habetur*, the judgment of a Court is held to be true and just."

The principle was the same in the English law, for both

laws derived it from the same source. Dr. Buchanan could not say that he had been a party to the case which had * 436 been already decided. It was said that * if the pursuer got possession and Dr. Buchanan afterwards claimed against him, and proved a descent from the grandmother, the present pursuer could not set up a deed which he had already reduced, and it had therefore been argued by *Mr. Follett* that this would have the effect of giving Dr. Buchanan instant possession. That would be so according to the English law. The difference between the two laws was on that very point. The reduction of the deed must be again effected, for, as Lord CRINGLETIE observed, "That as no man can reduce on death-bed, but the immediate heir, the proceedings in this case would necessarily fall, as having been at the instance of a party who had no right to insist on them." A case had been supposed on this subject. It was said that if a man was indicted for murder, and was afterwards pardoned, the record in the first case would be evidence in another to prove the title of one who founded on that murder a claim of assythment or compensation. If that would be so, it was certainly different from the law of England, for, in the first place, the parties were not the same, and the object of the indictment and of the action were not the same. Now it appeared from the case of *Rutherford v. Nisbett*, that in order that a record might be used as evidence in a second suit, such suit should appear to be instituted between the same parties, and for the same thing as the first. The case supposed, therefore, did not bear on the point in issue. In the present instance the pursuer was an utter stranger to Dr. Buchanan, who would treat him as such in any future contest as to the estate. This case must be governed by the general rule that no judgment in one cause could be given in evidence in another, except the second cause was between those who were privies in estate, * 437 or who claimed by descent from the parties in * the first suit. It did not come within the exceptions to that rule. Three of the Judges in this very case had admitted that the judgment could not be used for or against Dr. Buchanan; that it would not be considered as *res judicata* be-

tween him and the person against whom he gave evidence. Dr. Buchanan, therefore, had not such an interest in the event of the suit as would disqualify him from being called as a witness in it. Dr. Buchanan's interest was in fact of that uncertain and contingent kind that it would be impossible for any Court of justice whatever to allow him afterwards to make use of this record. He should, therefore, move their Lordships that this judgment be reversed. He felt the less reluctance in coming to this conclusion, because, recollecting the opinions of the Scotch Judges, that this would not be *res judicata*, the balance of authority in the Court below was in principle against this judgment.

Judgment reversed accordingly.

* ERROR

* 438

IN THE HOUSE OF LORDS.

LUCAS AND OTHERS v. NOCKELLS.

1833.

MATTHIAS PRIME LUCAS, Esq., WIL-	} <i>Plaintiffs in Error.</i>
LIAM THOMPSON, Esq., PHINEAS	
DAVIS, JOSEPH BULL, THOMAS LING-	
HAM, and CHARLES EICKE. . . .	
CHRISTOPHER NOCKELLS	<i>Defendant in Error.</i> ¹

Pleading. Trespass.

In an action of trespass, where the defendants justify under a *fi. fa.*, and the plaintiff replies *de injuria absque residuo causæ*, and new assigns, that the defendants committed the trespasses on other occasions, and for other purposes than in the plea mentioned, the Judge may leave it to the jury to say whether the execution was *bonâ fide* or colourable.

¹ S. C., 3 M. & Scott, 650; 10 Bing. 157.

June 25.

THIS was a writ of error upon a judgment of the Court of Exchequer Chamber at Westminster, affirming a judgment of the Court of King's Bench in an action of trespass brought in that Court, wherein the defendant in error was plaintiff, and the plaintiffs in error were defendants.

The plaintiff was sole owner of a ship called the "Emerald," on board of which certain goods, consisting of furs, oil, &c., had been shipped by one Thornton, at Van Diemen's Land, to be delivered in London to Messrs. Hopley & Lingham, or their assigns, they paying freight, as per charter.

* 439 * The first count of the declaration stated in substance that the defendants, on the 1st of January, 1823, with force and arms, &c., broke and entered a certain ship of the plaintiff, then lying in the London Docks, and greatly damaged the same, and seized and took away divers goods and merchandises then in the possession of the plaintiff on board the said ship, and on which the plaintiff had a lien for freight to the amount of 6000*l.*, and converted the goods to their own use. In the second count, the defendants were stated to have taken possession of the ship, and carried off and converted the goods of the plaintiff. In the third count, the defendants were charged with carrying off both ship and goods, &c.: in other respects this count was similar to the second.

The defendants pleaded separately: the pleas were in substance the same for all. First, the general issue, not guilty, on which issue was joined. Secondly, Davis and Bull, as bailiffs to Lucas and Thompson, then sheriffs of Middlesex, justified the taking of the goods, &c., by virtue of a writ of *feri facias*, on a judgment obtained in the Court of King's Bench in Michaelmas term, 3d Geo. 4, against Nathaniel Thornton, in the sum of 20,000*l.* and costs, by Randle Hopley, George Augustus Lingham, and Thomas Lingham; that the goods, &c., so taken were the goods of the said Nathaniel Thornton, and were thereupon sold under the said writ; and that the proceeds thereof were paid to Randle Hopley, George Augustus Lingham, and Thomas Lingham, in part

satisfaction of their debt. The replication to the last plea, protesting that there was no such judgment or writ, stated, that the defendants of their own wrong, and without the residue of the cause by them in the said last plea alleged, committed the trespasses in that plea named. On * which issue was joined. The plaintiff also newly * 440 assigned, that the defendants committed the trespasses on other occasions, and for other purposes than those mentioned in the pleas; to which new assignment the defendants pleaded not guilty. Whereupon issue was joined. The cause was tried before Lord TENTERDEN, when evidence was produced by the plaintiff for the purpose of showing, that at the time of the trespass the possession of the ship was in him, and that the goods were not taken by virtue of the writ of execution; but that the writ was had recourse to merely as a colour, to enable Thomas Lingham and his partners, who were the consignees of the goods, to get possession of and land the goods, as importers, without subjecting themselves to the claim for freight, which would have arisen if they had accepted the goods under the bill of lading; and that the goods were not sold by the sheriff, but were sold by Thomas Lingham and his partners as the importers. The Lord Chief Justice directed the jury that, in his opinion, the ship remained in the possession of the plaintiff, and that the question for their consideration was, whether the said goods were really and *bona fide* taken by virtue of the said writ or not; according to which, they would find for the defendants or plaintiff. To this direction the counsel for the defendants tendered a bill of exceptions, on the ground that the question left to the jury was not that which was raised on the face of the pleadings, for that if fraud was meant to be imputed it should have been specially replied, and could not be given in evidence under the replication in this case. The jury found a verdict for the plaintiff for 1950*l.*, and 40*s.* costs. Judgment having been given for the plaintiff in the Court of King's Bench in Michaelmas term, 7 Geo. 4, the defendants brought a writ of error in the Court of * Exchequer Chamber. * 441 In Easter term, 9 Geo. 4, the Court of Exchequer Chamber unanimously affirmed the judgment of the Court of

King's Bench. (a) The defendants then brought the present writ of error, praying that the judgments of the Courts of King's Bench and Exchequer Chamber might be reversed.

Wednesday, July 3, 1832.

Mr. Martin, for the plaintiffs in error. — The question left to the jury in this case did not arise upon the pleadings. The first point to which the attention of their Lordships should be directed was the clause in the charter-party as to the freight. It would be found by the charter-party that the cargo was to be delivered to the consignees on the arrival of the vessel, but the payment of the freight was not to take place till ten days afterwards. A stipulation for delay in the payment was incompatible with the assertion of a right of lien. That right was one which might be altered by agreement between the parties. *Saville v. Champion*, per ABBOTT, C. J., (b) *Hutton v. Bragg*, (c) and *Raitt v. Mitchell*. (d) There was, therefore, no lien, and it was clear that these goods were the property of the defendant in the execution, and were liable to be seized at the suit of a third party. If they were Thornton's goods they were liable to an execution issued against him. Secondly, there was no evidence whatever applicable to the new assignment. The special plea had justified the acts of breaking and entering the ship and taking the goods, &c. On that point the evidence on both sides was the same, so that in fact the new assignment was out of the question. The new assignment was only applicable when the act justified by the defendant in his plea was different from that which the plaintiff relied on as his * 442 * cause of action. If the act stated by both parties was the same, the plaintiff should answer by a replication, but if the defendant mistook the act, the plaintiff should point out the mistake by the new assignment. (e) The question, therefore, which was to be left to the jury must arise, if at all, on the plea and replication. The effect of the

(a) 2 Y. & J. 304; 4 Bing. 729, S. C.

(b) 2 B. & Ald. 510.

(c) 7 Taunt. 14.

(d) 4 Camp. 146.

(e) 1 Wms. Saund. 299 (n. 6); by the Court, *Cleasby v. Barnes*, 10 East, 80; 15 East, 286; 16 East, 82.

replication was to traverse all the traversable matters contained in the plea, except those protested. The case was therefore the same as if issue had been taken in the replication on the *virtute cujus*, and on a demurrer to it. A demurrer to that traverse would have been good. The pleadings in *Cleasby v. Barnes* were the same as here, and the facts alone were considered to be put in issue, the *virtute cujus* being treated as a mere inference of law. The first case on this point was in the 21 Hen. 6, p. 5. It was an action of false imprisonment: the defendant justified under a magistrate's warrant; the plaintiff replied *de son tort demesne sans tiel record*; that replication was held bad; then again, that the trespass had been committed without the precept, but that was held bad too, as the Court thought it must be intended that the party was taken by virtue of the precept. That was the principle which ought to govern the present case. In *Beale v. Simpson*, (a) which was an action for an escape, the defendant pleaded, that B. being in his custody, a *habeas corpus* was delivered to him, upon which he took B. out of prison and carried him to Westminster. The plaintiff traversed in this form, *absque hoc* that the prisoner had been taken out of prison by virtue of the former writ. It was held by Chief Justice TREBY that the traverse was bad, but the other three * Judges held that it was good. Their Lordships' * 443 attention was directed to this case with reference to two notes of Mr. Serjeant *Williams*. The replication referred to in Mr. Justice POWELL's second judgment was, in fact, one in confession and avoidance. It had been held lately in the Court of King's Bench, that a man who was in custody was so on the instant of the delivery of a second writ. In *Wms. Saunders*, (b) it was said, "it is agreed that where the words *virtute prætextu per quod*, and the like, introduce a consequence or inference from the preceding matter they are not traversable." In *Greene v. Jones*, (c) the same doctrine is asserted, and the report of that case in Keble is cited in support of it. In *Groenvelt v. The College of Phy-*

(a) 1 *Ld. Raym.* 408.(b) 1 *Wms. Saund.* 23 (n. 5).(c) 1 *Wms. Saund.* 298 (n. 3); *S. C.*, Keble, 607.

sicians, (a) the replication was *absque hoc*, that the act done was by virtue of the warrant. There was a demurrer to that replication. That case was put on the doctrine in 8 Coke, as to distraining for heriot service, where it was stated to be good law that if a man had authority to do a certain thing, and did it, he must be taken to have done it by virtue of that authority. In *Crowther v. Ramsbotham*, (b) which was an action of trespass for breaking into a cow-house, the defendant pleaded that he committed the trespass under a writ of *justicies*, and the plaintiff replied *de injuria*. That case was stronger than the present, and Lord KENYON there said, "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can show that he had a legal justification for what he did, that is sufficient. A man may

* 444 distrain for * rent and avow for heriot service. Now, it here appears that the defendants were justified, under the process of the County Court, in entering upon the premises and taking his goods, in order to compel an appearance, and therefore the question ought not to have been left to the jury to say whether they entered for that or some other cause." It would be difficult to do what Lord KENYON there said might be done, if the mode of traverse here insisted on were allowed. An instance of this might be found in questions relating to incorporeal hereditaments, such as rights over land. Suppose the case of a man who had the right of shooting over lands: he would aver that he entered for the purpose of exercising that right. In 99 cases out of 100 it might be proved that he had said he would shoot over the land for the purpose of annoying his neighbour. If evidence of that sort could be admitted, the man would be subject to damages for shooting over the land, though he had a perfectly good right to do so. The same questions might be raised in cases where arrests, perfectly legal in themselves, were made; and the right of a magistrate to issue a warrant might be defeated in consequence of some hasty expression previously uttered.

(a) 12 Mod. 386. The same case is reported in 1 Ld. Raym. 454, where the pleadings are set out at length.

(b) 7 T. R. 654.

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No question of right could properly arise on this replication. The point put in the Exchequer Chamber was, that the defendant had made himself a trespasser *ab initio*. The doctrine of a man making himself a trespasser *ab initio* was adopted for the purpose of preventing men from being guilty of the abuse of legal powers. *The Six Carpenters' Case*. (a) In such a case the replication should show the fact of the abuse. (b) There was no evidence applicable to the new assignment; the case, * therefore, rested on the * 445 other pleadings, and the question left to the jury was erroneous. As to the question of lien, the first count stated that the plaintiff had a lien to a large amount on the goods. That was not the fact. If the plaintiff had no such lien, then Nockells was a wrong-doer in refusing to deliver them. The Judge, therefore, ought to have told the jury that there was no lien. If the man who had a right to the goods was not justified in entering the ship, still it was a material question as to damages, whether the goods were or were not the property of the man who entered. That was the question which the counsel for the defendant proposed to submit to the jury. The verdict was for the amount of the value of the goods, which showed that the jury did not give damages for any thing but the mere taking of the goods. Lastly, if there was no evidence to justify the verdict of the jury on the new assignment, the judgment being entered on the new assignment must necessarily be erroneous.

LORD TENTERDEN. — You cannot affect the judgment by any thing appearing merely in the bill of exceptions; the matters there set out are applicable only to the exceptions taken at the trial.

Mr. Campbell and *Mr. Maule*, for the respondent. — The bill of exceptions proceeded on the ground that the action could not be maintained, for that the plaintiff was out of

(a) 8 Rep. 290.

(b) 1 Wms. Saund. 800 (n. d); 2 Wils. 313; 3 Wils. 20; 3 T. R. 292; 1 H. Black. 555, S. C.; 6 Com. Dig. Pleader, 563, pl. m. 43. tit. New Assignment.

possession of the ship. Now it was admitted, that in fact the plaintiff was not out of possession of the ship, but it was said that he had no lien upon the goods. As the plaintiff had possession of the vessel, he had a qualified possession of the cargo. The only question was, whether the learned Judge was justified in leaving the question to the jury in

* 446 the manner he had done. * The new assignment raised that very question. It stated, that the defendants had entered on other occasions, and for other purposes, and with excess had committed this trespass. The new assignment distinguished this case from all those which had been referred to. It was true, that if the plaintiff and defendants were agreed upon the act of trespass there could be no new assignment; but how was it to be ascertained that they were agreed? In the cases referred to, the new assignments were bad on demurrer; but could the new assignment have been demurred to in this case? For any thing that appeared on this record, the defendants might have entered by the writ, but have stayed and done many things, for which that writ gave no excuse. This case was not to be distinguished from a case of trespass, *quare clausum fregit*. It was stated, that where the defendant was a trespasser, *ab initio*, he could not be shown to be so by denying what was stated in the plea; but then that was the very reason for the new assignment. Under this new assignment, the plaintiff was justified in giving in evidence that the defendants had abandoned the execution, and acted on the bill of lading. If that were so, then it was clear that they did not enter in the manner stated in the plea, but upon another occasion, and for another purpose. The replication denied every thing, that was not a mere conclusion of law, but was a material substantive traversable fact. Now the plea, after alleging the judgment and the writ, said that the defendants entered by virtue of that writ, and seized the goods for the purpose of satisfying the exigency of it. The evidence was, that the defendants entered and pretended to take the goods under the writ, but that they took them as the property of Hopley and Lingham, to whom they were handed over, and who sold, as

* 447 importers of the goods, * for their own benefit. That

was the excess complained of. Hopley and Lingham swore that their sale was the first sale, thus negating the pretended sale from the sheriff. That made them trespassers. That distinguished the case from *Crowther v. Ramsbottom*, (a) where nothing was done but under the writ of *justicies*; here something was done which the writ could not justify. Suppose goods thus seized had been thrown into the river, or wine drunk, could it not be said that the parties doing these things came in under a writ but afterwards acted without authority? It had been said, that there was no evidence applicable to the new assignment; but no exception had been taken on that ground at the time of the trial. The only point then taken was, that a certain question did not arise on these pleadings. What was the nature and office of a new assignment, and when was it admissible? It was admissible where the declaration complained of something that had been done at an indefinite period of time, and one act of the kind was justified in the plea; so that it would not be inconsistent in the record showing what was the real act of trespass, and saying that the matter of the plea was a matter different from that which was stated in the declaration. The present case, however, was not properly a case of a new assignment. Suppose the party complained of an act of trespass, and the defendant justified under process, the defendant must admit that he had committed the identical trespass complained of. Suppose the plaintiff thought the defendant had exceeded the authority given him by that process, he ought not to new assign, though that was the term used in the former judgments in this case, but should reply the excess. That would admit and avoid the plea, and show that the plea was not justified in law; for it would show * that the defendant had acted without * 448 or against the law. A new assignment would, under such circumstances, be a departure. These considerations, as to the nature of the new assignment, got rid of the cases on the other side. With respect to the *dictum* of *virtute cujus* not being traversable, it was evident, on looking through the case in Lord RAYMOND, that according to the

(a) 7 T. R. 654.

understanding of the Court, the *virtute cuius* merely stated the effect of the preceding allegations. In *Dr. Grenville's Case*, (a) there was a traverse of the *virtute cuius*. There was an admission, that the occasion mentioned in the declaration and the plea were the same, and there was no replication of excess. It was true that a matter of law could not be traversed; but they might traverse the question, whether a person acted under authority, or had been guilty of excess, and if he had, that excess should be stated in the replication. That was the effect of the resolution in *The Six Carpenters' Case*. (b) In the Year Books, (c) an action of trespass was brought, complaining of one act. The defendant pleaded that he was the lessor of the plaintiff, and entitled to view the waste, and had entered for that purpose; the plaintiff replied, that the defendant had stayed all night, and the plaintiff had judgment, for that replication showed excess. In the Year Books, (d) there was an action of trespass for breaking into the plaintiff's close, and taking away his cattle. The defendants pleaded that the close was the freehold of A. B., and that by his command they took the cattle damage-feasant; replication, alleging that after the taking they converted the cattle to their own use.

These cases showed that the law would allow the question, *quo animo* the party entered. Several of these * 449 * cases were commented on in the judgment of the Chief Justice of the Court of Common Pleas, in the Exchequer Chamber. There was not the slightest ground for complaining of the manner in which the learned Judge who tried this cause left the case to the jury; for the question, whether the defendants had acted under the authority stated, or had exceeded it, was raised, and properly raised, by the plea and the new assignment.

Mr. Martin, in reply. — The sale of the goods was regularly made by the sheriff, and the proceedings at the custom house were those that were necessary by the custom-house regulations. The question whether the execution was col-

(a) 12 Mod. 386; 1 Ld. Raym. 454.

(b) 8 Rep. 290.

(c) 11 H. 4, 75, b.

(d) 28 H. 6, 5, b.

lusive or not, was not open for consideration upon the pleadings. By confining themselves chiefly to the new assignment, the other side seemed to admit, that but for that the question could not have been left to the jury. They had not, however, overthrown the authority of one of the cases already quoted. A distinction had been attempted to be taken between cases where the trespass was single, and those where trespasses were alleged to have been committed an indefinite number of times. In the former case, a new assignment would be bad on demurrer; in the latter, it would not be bad on demurrer, but it might be defeated on the proof. That was the effect of the note in Saunders. (a) The case of throwing the cargo into the river, or drinking the wine, would clearly make the party a trespasser *ab initio*; but these things should be made the subject of a special replication. The plaintiff did not state the facts which went to constitute the excess; but if they existed, which they did not, they should have been replied specially. The liability of Hopley and Lingham to * pay the freight, if they had accepted the goods * 450 under the bill of lading, was not so clear as was supposed. The time when the objections were taken was the proper time for taking them. The replication was general; the pleadings were good in themselves; and the objections arose only when questions were put to the jury that ought not to have been submitted to their consideration.

Lord TENTERDEN (Deputy Speaker). — This case has been very ably argued on both sides. The question that is raised on the record now before your Lordships turns principally on a matter of form. That question is, whether it was competent for the plaintiff on these pleadings to show, in maintenance of the action, that although a writ was issued to the sheriff, at the suit of the defendant, on a judgment obtained by the defendant against a third party, yet that all that was done under that writ was mere collusion, and that the writ was made use of, not for the purpose of levying the debt, but in order to get possession of the goods with another view. The question is not so much one of law as of form. His Lord-

(a) 1 Saund. 299, c.

ship having stated the pleadings, and the facts as set out in the bill of exceptions, put a question to the Judges in the following form: "Was it competent in law, on these pleadings, for the plaintiff to show at the trial, in maintenance of his action, that the acts of the defendants were not really done under or in execution of the writ, but for another purpose, under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods?"

Questions were afterwards framed, formally stating the pleadings, the evidence, and the point raised by the bill of exceptions, and requiring the opinions of the Judges thereon.

* 451 * Their Lordships required time to consider. Judgment was accordingly postponed.

On the 25th of June, 1833, the Judges delivered their opinions in the following order:—

MR. JUSTICE BOSANQUET.—In this case, it appears to me that the new assignment may be laid out of consideration. The question upon which my humble opinion turns is this, whether the evidence in the case supposed by your Lordships relates to a particular allegation contained in the plea and denied by the replication. The effect of the replication is to put in issue every material fact, except the judgment and the writ of *fi. fa.*, which constitutes any part of the cause for which the defendant alleges that he committed the acts professed to be justified. Whatever part the plaintiff might, consistently with the rules of law, have traversed separately, he denies by the general form of replication, which he is allowed to employ in such case as this. It may be assumed that in the action shortly described in your Lordships' question, the declaration would state that the defendant broke and entered the plaintiff's house, seized, took, and carried away his goods, and converted and disposed of them to his own use; and that the plea would profess to justify the entry of the house, and the seizing, taking, and carrying away, and converting and disposing of the goods to the defendant's use, and for that purpose would allege that the goods liable to be taken

in execution under and by virtue of the writ and warrant to the bailiff were in the house ; that under and by virtue of the writ and warrant, the bailiff entered the house in order to seize and take, and did seize and take, the goods in execution ; and afterwards, and before the return of the writ, sold the goods ; and by sale thereof made and levied a sum of * money in satisfaction of the debt and damages. Such * 452 is, in fact, the form of the pleadings in the case which was argued at your Lordships' bar. The plea, therefore, would profess to allege, by way of an excuse for the entry, seizure, and conversion of the goods, that they were taken in execution, and a levy made thereof, in satisfaction of a debt. If this allegation contain matter of fact, it is traversable ; if it be merely a consequence of law, it is not traversable ; and whether the evidence mentioned in the question ought to be submitted to the jury must depend, as it appears to me, upon this point, viz., whether the allegation is to be viewed in the one light or the other. Whether the writ authorized the defendants to do any particular act, alleged to have been done, is matter of law, and cannot be traversed ; but whether the defendants actually did any particular act, which they alleged to have been done, is a matter of fact, and may be denied. It has been truly said that, if it be alleged that a particular act was done by virtue of a certain writ, the doing of such act by virtue of the writ is not traversable, because it is an inference of law ; but if it be material to show whether the act itself was done or not, it will not be the less traversable, because it is alleged to have been done by virtue of a certain writ. It would not be competent to the plaintiff to insist, under the general denial contained in his replication, or under any more special traverse, that the writ in question did not authorize the bailiffs to take in execution the goods of the debtor, and to seize and sell them in satisfaction of the debt, as they have alleged ; but whether they did really take the goods in execution, and deal with them as alleged in the plea, or seized them for purposes foreign to the execution, and disposed of them in some manner other than by way of sale in satisfaction of the debt, was, as it * appears to me, a * 453 matter of fact, put in issue by the replication, and to

which the evidence in question was applicable. In the case of *Beal v. Simpson*, (a) POWELL, J., said, he confessed that, generally, the matter of a writ is matter of inference of law only, and then not traversable; but matter of fact may depend upon it, and then it is traversable; as, in that case, the taking out of prison; and for that reason it was there traversable. And NEVILL and BLENCOW, Js., agreed with POWELL, J., that generally a *virtute cuius* is not to be traversed, containing matter of law; but when it is mixed with fact, there it may be traversed: and though TREBY, C. J., held that *virtute cuius* was not traversable in any case, it was given for the plaintiff according to the opinion of the majority of the Court. The principal authorities relied on by the defendants, and supposed to bear most directly upon the subject, are *Dr. Groenvelt v. Dr. Burwell*, (b) and *Crowther v. Ramsbottom*. (c) But neither of those cases appear to me to govern the present, notwithstanding the resemblance they bear to it in several circumstances. In the case of *Dr. Groenvelt v. Dr. Burwell*, the plaintiff having complained of an assault and false imprisonment, which the defendants justified under a judgment of the College of Physicians, and a warrant issued thereon, the plaintiff, after protesting as to certain allegations of the plea, replied, that the defendants of their own wrong assaulted and imprisoned him as before alleged, and not by virtue of the warrant supposed in the plea. Upon demurrer, Lord HOLT declared the opinion of the Court that the replication was bad, as well in matter as in form. He says, the defendants say

there was such a warrant, and that by virtue thereof
 * 454 the plaintiff was * arrested and imprisoned; to which
 the plaintiff does not make answer, that there was not
 such a warrant, nor traverses it, but only says that he was not
 arrested by virtue of it. If he had denied that there was such
 a warrant, it had been a good traverse; for the officer would
 not have been authorized to arrest the plaintiff. He says, "If
 the officer had a good warrant at the time of the arrest, though
 he had declared that he had arrested upon a warrant that was
 insufficient, yet, in an action brought against the officer, he

(a) 1 Ld. Raym. 410.

(b) Ld. Raym. 454.

(c) 7 T. R. 654.

might have justified under the good warrant, having had it in his custody at the time of the arrest." And he compared the case to that of a man who distrains for one thing, and avows for another; which undoubtedly he may do. And he held the traverse ill. It is evident that the objection here made to the traverse is, that, as the warrant, the arrest, and the imprisonment were admitted, the traverse that the arrest and imprisonment were made by virtue of the writ was not allowable. Neither the validity nor the effect of the warrant could be disputed under such a traverse; "*traversat* (says the special demurrer) *virtutem warranti quæ non est traversabilis existens validitas et materia legis*;" and if the defendants only did that which they alleged in their plea that they had done, by virtue of the warrant, the denial that the defendants committed the assault and imprisonment by virtue of the warrant, amounted to no more than saying, that, although the defendants were in possession of a warrant, the sufficiency of which to justify those acts the plaintiff was not in a condition to dispute as a matter of law, the defendants at the time of the act done had assigned a different reason for their conduct. Inasmuch, therefore, as this circumstance would afford no answer to the defendants' justification, the traverse *founded upon it was not material. Such also appears * 455 to have been the point professedly decided in *Crowther v. Ramsbottom*. The action was brought for seizing and taking cattle, and the defendant justified under a *justicies* out of the Chancery of the County Palatine of Lancaster, and a precept from the sheriff, commanding the defendant to attach the plaintiff by his goods, to compel his appearance, and alleged, that the cattle were taken for that purpose, and that the plaintiff having appeared, the cattle were redelivered.

The plaintiff admitting the writ, replied *de injuriâ absque residuo causæ*, as in the present case. At the trial, evidence was adduced to show that the object in executing the writ was not to compel an appearance, but to enforce payment of a debt and the costs; and the Judge left it to the jury to say whether the defendants entered for the mere purpose of compelling appearance or for the purpose of compelling the plaintiff to pay the debt and costs. Lord KENYON, in delivering his opinion

on a motion for a new trial, said: "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can show that he had a legal justification for what he did, that is sufficient. A man may distrain for rent and avow for heriot service. Now, here it appears that the defendants were justified under the process of the Chancery Court in entering on the plaintiff and taking his goods in order to compel appearance, and therefore the question ought not to have been left to the jury to say whether they entered for that or for some other cause." As to the excess, he said, "that is a subject for an action on the case." Mr. Justice LAWRENCE quoted *Dr. Groenvelt's Case* as directly in point.

It may be admitted, that the object and motive with which the process of the law is put in execution are not
 * 456 * the subjects of traverse, nor consequently of evidence, under the replication *de injuriâ absque residuo causæ*. And to this extent, and to this only, do the cases cited appear to me necessarily to go. It frequently happens that the real object of arresting a defendant upon *mesne* process is not to compel appearance to an action, but to procure immediate payment of a debt by the pressure of an arrest; but if nothing more be done than is required by the exigency of the writ, the act will be justified, whatever be the motive of the party, or the cause which leads him to employ the process of the law.

In the case put by your Lordships, the evidence points not merely at the object and purpose of doing particular acts, but to the nature of the acts done, in order to ascertain whether they correspond with the description of them in the plea, which alleges not merely a taking of them by virtue of the writ of execution, but a sale and levy in satisfaction of a debt.

The case, as it appears to me, stands thus: The defendant, by way of excuse, alleges that he has done various acts; all of which, if done, would be authorized by the writ; and which, if taken jointly, would afford a good defence to the plaintiff's whole complaint, but, taken partially, would not. The plaintiff, admitting the writ, denies the rest of the cause,

and offers evidence to show that part of the defendants' acts were quite of a different character from those described in the plea. By this evidence, the effect of the writ is not impeached, but only the execution of it in fact; and unless it was executed in fact, as alleged, the defence must fail.

The materiality of this consideration may be illustrated by supposing the following case: Goods were shipped abroad to be delivered in England. By the charter-party freight for carriage of the goods is made payable within a limited time; suppose ten or fourteen days after the delivery of the goods; and by the bill of lading the goods are to be delivered to the shippers or their order, paying freight according to charter-party. In such case, the goods would become deliverable to the order of the shipper before the freight for carriage of the goods would become payable. It might, therefore, be insisted by the consignees, that at the time of the delivery of the goods no lien had attached, the time for delivering the goods and for payment of the freight not being contemporaneous; yet if the consignees claimed the goods as holders of the bill of lading, they would, by taking under the bill of lading, become liable to perform the condition of it, and to pay freight at the expiration of the stipulated time. For "if a person accept any thing, which he knows to be subject to a duty or charge, it is rational to conclude that he means to take the duty or charge upon himself; and the law may very well imply a promise to perform what he has so taken upon himself." Abbot on Shipping, p. 286, 5th ed. In this state of things, therefore, if the consignors, in the character of execution creditors, could get the goods out of the possession of the ship-owners, before the freight had become due, without resorting to the bill of lading, they might refuse to pay the freight, and leave the ship-owner to his remedy against an insolvent shipper. It would, therefore, become an important question whether the goods were really taken and sold by the sheriff by way of levy of a debt in execution, or whether the writ of execution was not employed as the means only of getting the goods into the possession of the consignees, to be dealt with by them as they should think fit under the consignment, without produc-

ing the bill of lading. As consignors, they could have no right to the possession without claiming under the bill of lading, and as execution creditors, they could not justify taking possession except for the purpose of levying their debt by the hands of the sheriff.

* 458 * Much embarrassment seems to have arisen in this case from the use of the word "purpose." What was the purpose of levying an execution on the goods is one question, and whether the goods were disposed of for the purpose of levying an execution upon them, is another and very different question. The first assumes an execution to have been executed; the other raises the issue, whether an execution was executed or not. If there was a real execution in this case, the allegation in the plea was maintained; if there was not such execution, it failed.

The ground, therefore, upon which my answer to your Lordships' question is founded is, that the evidence therein mentioned tended to show that the act done by the defendants was not the act alleged in their plea as part of their excuse, viz., an execution by levy upon the goods, but an act of a different character. For these reasons, I am humbly of opinion,

That it was competent by law, on the pleadings mentioned in your Lordships' question, for the plaintiff to show at the trial, in maintenance of his action, that the acts of one defendant were not really done under or in execution of the writ, but under another claim, and that the writ, and the proceedings under it, were a mere colour and contrivance to get possession of the goods.

MR. JUSTICE PARKE. — To the questions submitted by your Lordships to his Majesty's Judges, I answer, that, in my opinion, it was not competent to the plaintiff, upon these pleadings, to give in evidence that the act of the defendants was not really done in execution of the writ, but for another purpose, under another claim; and that the writ, and proceedings under it, were a mere colour and contrivance to get possession of the goods.

One defendant states a judgment, and both a writ of exe-

cution against the goods of A. B.; the delivery to the *sheriff of that writ; that there were goods of A. B. *459 in the place where the trespasses were committed; and that the defendants were entitled to seize, and did seize and sell, the goods under the writ. There is an admission of the judgment and writ in the replication, and a traverse of the residue of the cause. There is also a new assignment of trespasses at other times, on other occasions, and for other and different purposes; and also alleging excess. And the question is, whether the above evidence was admissible, either on the traverse of the residue of the cause, or the new assignment.

I propose to consider these two parts of the question in an inverse order; for there is no difficulty about one, and the other requires further consideration. First, then, with respect to the new assignment, it is clear that the office of a new assignment is to correct a mistake, occasioned by the generality of the declaration, and to explain that the plaintiff is proceeding for a different cause of action from that mentioned in, and justified by, the plea: it admits, that the trespasses intended by the plea are not those for which he seeks redress. If the plaintiff is seeking to recover for the trespass mentioned in the plea, and justified by it, he must reply, and either traverse, or confess and avoid, the matter of the plea. Now, in either case, the plaintiff is, in truth, as appears from the evidence offered, insisting that the same acts, attempted to be justified by the plea, were not justified by it. The evidence applies to the acts mentioned in the plea, and not other and different acts on another and different occasion. But it has been contended, that the new assignment may be treated as if, after traversing the matter in the plea, it had gone on to aver that the trespasses mentioned in the plea were done for other and different purposes than those in the plea mentioned; that, under such a new assignment, it is clear the evidence would have been admissible; that such a new *assignment might, in- *460 deed, be demurrable; but that, not having been demurred to, the evidence may be given under it. To this I answer, that the new assignment does not contain any aver-

ment that the trespasses mentioned in the plea were done for other and different purposes; if it had, it would have been bad on demurrer to so much of the new assignment; and if it had contained that averment alone, viz., that all the trespasses in the plea were committed for a different purpose, it would have been bad altogether; for then the replication and new assignment would have contained two answers to the same trespasses mentioned in the plea; one, a denial of the truth of the several matters comprised in the traverse, *absque residuo*; another, that the same trespasses were done for other purposes. And it was on this ground that the replication and new assignment were held to be bad in the case of *Cheasley v. Barnes*, (a) besides its being objectionable on another ground, which I propose to consider afterwards, viz., that the purpose could not be inquired into at all. If there had been a demurrer to this new assignment, the answer would have been, that the plaintiff meant—as he had a right to do under this declaration, which is not for a single trespass—to insist on other trespasses, committed at other times, and unconnected with the writ of execution, and not then attempted to be justified, and to apply the declaration, which contains an averment of trespasses committed on divers days and times, to such other trespasses; and such answer would have been a good one. The new assignment would, therefore, have been good on demurrer. And as the defendants must clearly have the power of objecting at some time, it follows that it was open for them to contend on the trial, that the plaintiff had no right to give

in evidence, under this new assignment, that the entry
 * 461 justified by the plea, as having * been made by virtue of the writ, was made for a different purpose; and that was the first time at which it was competent for them to take the objection. It is also clear that the part of the new assignment which relates to excess is inapplicable to the evidence offered; the excess alleged appearing by the record to be the use of excessive and unnecessary force and violence. It is clear, therefore, as it seems to me, that the new assignment will not authorize the reception of the proposed

(a) 10 East, 78.

evidence. And it is to be observed, that it is on the ground of the new assignment only that the Court of Exchequer Chamber decided that such evidence was admissible in the present case, as reported in 4 Bing. 729.

The question, therefore, is reduced to this, whether on the general traverse of the residue of the cause such evidence is admissible? This replication admits the judgment and the writ; and, therefore, I conceive it to be clear, that the party so admitting cannot say there was, in point of law, no judgment and no writ. If by the terms "colour and contrivance," in the question submitted by your Lordships, it is meant to be suggested that these were fraudulent and void, and supposing even that the sheriff was a party to the fraud (which the evidence offered does not prove), I conceive that such fraud should have been replied specially, in avoidance of the judgment and writ.

Supposing, then, the judgment and writ to be valid, which I think the pleadings admit, the question is, whether, upon this traverse, the plaintiff can be permitted to show that the defendants did not enter under the writ, and in execution of it, but that they entered nominally under the writ, but in reality under a different claim. This is a question of some nicety and difficulty. But, upon the best opinion I can form, I must say that it appears to me he cannot; and that * there should have been a special replication, in order * 462 to have enabled him to have done so. The plea, as shaped in the question proposed by your Lordships, does not justify the taking of the plaintiff's goods, nor does the plea in the case argued at your Lordships' bar; but it goes on to state, that the goods of A. B., which were taken, were sold; and the plea upon the record in this cause also states that part of the money was levied by the sale of the goods, and paid over to the execution plaintiff. In order to make the question clearer, I shall consider how it would have been if the plea had not stated the sale of the goods; and afterwards, whether the introduction of that averment makes any difference. Supposing the plea to have done no more than state the judgment, the writ, the delivery to the sheriff, that there were goods in the house liable to be taken under

the execution, and that the defendants entered the house to seize, and did seize, the goods under the writ, the question is, what the traverse *absque residuo causæ* puts in issue? It certainly puts in issue the delivery of the writ to the sheriff before the seizure, the existence of the goods of A. B. in the house, liable to be seized under the execution at the time of the entry, and in this case, it may be, the seizure also; does it put in issue the intention and purpose which the defendants had in making the entry? This is precisely the same question which would have arisen if the delivery of the writ and the existence of the goods in the house had been admitted, and the replication had traversed, without any special inducement, the entry so made under, or, in the usual language of pleading, under and by virtue of, the writ. Now I take it to be a perfectly clear and settled law, that if a man has a legal authority, by writs or otherwise, to do all that he does, it is quite immaterial whether he intends

* 463 to use that authority or not, or even * declares that he does not intend to use it. If he is authorized by a writ, or in any way, to do a particular thing, and he does it in the manner in which he is authorized, he does it by authority of the writ, or, which is the same thing, "under, and by virtue or by force of," the writ. One of the earliest authorities is in Fitz. Avowry, 232: "If a man take a distress for one thing, still, when he comes and pleads, he may avow for whatever thing he pleases." And in *Groenvelt v. Burwell*, (a) Lord HOLT refers to this case, and says, the single question is, whether he had good authority at the time of the arrest; as if a man distrain his tenant for that which he cannot justify, but at the same time rent is in arrear, he may avow for the rent in arrear, and he is not obliged to avow for that for which he took the distress, nor can the plaintiff traverse the taking for the rent in arrear, but can only plead in bar to the avowry, *riens in arrière*. So, he says, referring to the particular case, "The plaintiff cannot say that Cole did not take him by virtue of the good warrant, for if he had such a warrant in his custody at the time of the

(a) 1 Ld. Raym. 454.

arrest, he was arrested by it." So, in the same case, (a) Lord HOLT says, "It is not what he declares, but the authority which he has, which is his justification." In *Crowther v. Ramsbottom*, (b) Lord KENYON says, "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was mentioned. If he can show that he had a legal justification for what he did, that is sufficient. A man may distrain for rent, and avow for heriot service." He goes on to say, "Now here it appears that the defendant was justified, under the process of the * County Court, in entering on the plain- * 464 tiff and taking his goods, in order to compel an appearance, and, therefore, the question ought not to have been left to the jury to say whether they entered for that or for some other cause ; " and LAWRENCE, J., gave the same opinion. It is to be remarked, that in this case there is the clearest evidence that the defendant entered, not for the purpose of distraining to compel an appearance, but to compel the payment of a debt, under colour of process ; it even appeared that he kept the goods seized for four or five days after the tender of the appearance money ; and yet it was held that the replication admitting the writ, and traversing the residue of the cause, did not put in issue the question, whether the goods were seized by "virtue of the precept." It appears to me, therefore, that these authorities clearly establish the general proposition, that if a man is authorized by law to do the act he does, he is authorized in doing it, whatever his object or intention may be at the time he does it ; and therefore where a sheriff has a writ, authorizing the seizure of certain goods, and he seizes those goods, he has a right to say, in point of law, that he seized under the writ.

But it is contended, that there are authorities which show that an averment that a fact was done by virtue of a writ, or in technical language, *a virtute cujus*, is traversable, and that, therefore, it might properly be put in issue in this case ; and it is true that there are such authorities ; but they are all cases in which the traverse included some matter of fact, or

(a) 12 Mod. 386; and in Comyn's Rep. S. C. 78.

(b) 7 T. B. 657.

in which the question raised by it was, whether the writ really authorized the act, and not what the intention or purpose of the party having the writ was; and in all, the inducement to the traverse showed that the meaning of it was, not to put in issue a matter of law, but the

* 465 * question of fact, whether those circumstances existed which were necessary to make the writ a sufficient authority to do the act justified. Thus, in *Beale v. Simpson*, (a) the principal authority on this subject, which was an action against a bailiff of a liberty for an escape, the plea was, that the debtor was carried from the prison of the liberty of Westminster, under a *habeas corpus*, issued in Hilary, returnable in Trinity, and delivered to the defendant before the escape. Replication pleads by way of inducement, that another *habeas corpus* was issued in Hilary, returnable in Easter, and after the return of that writ, and not before, the debtor was taken out of prison and brought to Westminster, and then the defendant, by covin, procured another writ, tested before, and returnable in Trinity term, which was delivered to the defendant after the debtor was so brought, and not before; by virtue of which last writ, the debtor was brought into Court, and then committed to the Fleet; and concluded with a traverse, without this, that the defendant, by virtue of the writ in the plea mentioned, took the body of the debtor out of the prison of the liberty and carried him to Westminster, as averred in the plea. Now the majority of the Judges in this case were of opinion that the traverse was good, as it involved matters of fact; and POWELL, J., mentions the removal from prison as one; TREBY, C. J., *contra*. But it does not involve the question of the intention of the defendant when he removed the debtor; it involves the question, whether the debtor was taken from the prison; also the question, whether the writ in the plea mentioned really did authorize the removal, and it did not, certainly, if it was issued and delivered to the sheriff after the removal. In the case put by POWELL, J., the same observation applies. The case is this: If two writs be delivered to the sheriff against A., one at the

(a) 1 Ld. Raym. 408.

* suit of B., returnable first return of Hilary, another at * 466 the suit of D., returnable the last return of the same term; and D. procures a warrant on his writ, upon which A. is arrested after the return of B.'s writ, and then gives a bail-bond for his appearance; and in a suit upon this bail-bond A. pleads that he was arrested upon the suit of B., returnable the first return of the term, and that he gave the said bail-bond after the return of the writ, by which it was void; the sheriff replies the other writ at the suit of D., and that A. was arrested; and *absque hoc* the arrest was by virtue of the writ of B.; there it is clear that B.'s writ did not authorize the arrest at the time it was made and the taking of the bail-bond.

In *Foster v. Jackson*, (a) where the plea to a *sci. fa.* on a judgment against executors was, that the original defendant was taken by the sheriff by force of a *ca. sa.*, the replication was, that the sheriff did not take by virtue of the *ca. sa.* It is clear the taking is involved, and probably also the existence of the writ itself, as well as its delivery to the sheriff; and besides, the question there arose, not on demurrer to the replication, but after verdict. In the case of *Bennet v. Filkins*, (b) the traverse (which, however, was objected to by Saunders) is good on the same ground. .

The result of these authorities is that the *virtute cujus* may be traversed where it involves matters of fact, and the question whether the writ did or did not authorize a particular fact, that is, whether those circumstances existed which gave it authority. But it is not traversable where it involves a mere matter of law; and if a man has the authority of a writ, and does the act authorized, and no more, it is a matter of law that he is justified in the act, whatever the intention may be. An averment that the act was done under and by virtue of the writ, * is equivalent to an * 467 averment that it was done by the authority of the writ, or, in other words, that the writ authorized the act to be done. If, indeed, the authority of the writ be not pursued, but some act be done by the party who has it, inconsistent with its authority and an abuse of it, then the law adjudges

(a) Hob. 52.

(b) 1 Saund. 20.

by the subsequent act *quo animo* the party did the thing complained of, and the defendant will derive no justification from the authority which he had. *Six Carpenters' Case*. But it is to acts done, and not to declarations and intentions, that the law looks; 3 Rep. 26 a.: for the law doth respect deeds, but words without acts are not in this case regarded by law; and Lord COKE instances a case of distress for one thing and avowry for another.

But it is quite clear that all acts done which make the party unjustifiable under the authority of the law, and a trespasser *ab initio*, cannot be given in evidence under the general traverse, but must be specially replied: 1 Saunders, 300, b. n. g; *Dye v. Leatherdale*, (a) *Taylor v. Cole*, (b) *Cundry v. Feltham*. (c)

If acts done, by which the intention of the party is less unequivocally demonstrated, cannot be given in evidence under the general traverse, why should other more equivocal proofs of the intention from declarations be admissible? In truth, looking by way of illustration to the evidence offered on the trial, which appears by the bill of exceptions in the case itself, the strength of the case is, that the goods were delivered over to Hopley and Lingham, the execution creditors, by the defendant, the sheriff. This is an act done, which is a strong, and indeed the only evidence of defendant's intent and purpose; and surely this, upon the sup-
* 468 * position of the state of the pleadings on which I have been arguing, is a matter which should have been replied.

From the reasons which I have above given, I conceive it to be clear, that a man, whatever his purpose may be in acting according to the authority of a writ, is justified by it, if he acts according to it; but if he does an act inconsistent with its authority, he is no longer justified by it, but is either a trespasser *ab initio*, or is liable to another action, according to the nature of the inconsistent act so done. In the present instance, therefore, if the plaintiff had replied that the goods were delivered up by the sheriff, it would have been a good

(a) 1 Wills. 20.

(b) 3 T. R. 292; 1 H. Black. 555.

(c) 1 T. R. 338.

answer, but it is no answer as a proof of the intention of the defendants under the general traverse.

I have so far argued the case on the supposition that the plea justified the trespass to the house, by the statement of the writ, and delivery to the sheriff, and seizure of goods in the house liable to execution, and omitted all mention of the subsequent sale or levy, and payment to the execution plaintiff.

The next question is, whether the averment of the sale or levy, or both, make any difference. Now it is to be observed, that the plea does not justify seizing the plaintiff's goods, but only the entry into the plaintiff's house; and the question is, whether the unnecessary averment that the goods had been sold, &c., is involved in the issue that the defendants committed the trespasses without the residue of the cause alleged in the plea. I take it to be clear, that the plea need have stated no more than the judgment: in the plea by the creditor, the writ, and entry under it, and the seizure of the goods of A. B. under the writ, — if, indeed, even that was necessary in the pleas by both, — and that if he had omitted to state that the goods had been sold, it would not have made any difference; and it is a general rule * in pleading, that * 469 an unnecessary averment, if capable of being separated without injury to the sense, need not be proved. That so much of this plea as relates to the sale and levy may be so separated admits of no doubt. Suppose that, under these pleadings, the defendants had never sold at all, but having really entered and seized in order to execute the writ, they had kept the goods unsold for want of buyers, would not the defendants have been entitled to a verdict? and if so, it must be on the ground that the statement as to the sale is immaterial, and may be rejected. I think, therefore, that the averment of the sale, in this case, is immaterial. But that is not the question proposed by your Lordships, whether it was necessary under these pleadings to prove the sale of the goods and payment of the money. The question is a different one; and I feel satisfied that it was incompetent for the plaintiff, upon the pleadings stated in your Lordships' question, to give evidence that the acts of the defendants were not

really done under and by virtue of the writ, but for another purpose, under another claim, and that the writ and proceedings under it, were a mere colour and contrivance to get possession of the goods.

MR. JUSTICE GASELEE. — Having attentively considered the question put by your Lordships to the Judges in this case, I continue of the opinion in which I concurred in the Court below, that it was competent by law on these pleadings for the plaintiff to show at the trial, in maintenance of his action, that the acts of the defendant were not really done in execution of the writ, but for another purpose, under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods.

The difference between this case and those of *Groenvelt v. Burwell*, and *Crowther v. Ramsbottom*, which are principally relied on by the plaintiffs in error, is so fully stated by the late Lord Chief Justice of the Court of Common Pleas, in giving the unanimous judgment of the Court of Exchequer Chamber, and by some of my learned brothers to your Lordships on this occasion, that it would be unnecessary waste of time to go over them again at any length. The main difference is, that in those cases what the defendants in their pleas professed to have done, they had done. Here it is not so. They have not executed the writ; they have not made the debt of the goods and paid it over to the creditors, but have delivered over the goods themselves, not in satisfaction of the debt, as directed by the writ, but to the importers claiming under a bill of lading and seeking to avoid any other question of the payment of freight, or any other charge upon which any question might arise. This I am inclined to think also satisfies the new assignment. But it is said it was not competent to the plaintiff below to reply, and also to new assign, because, it is alleged, there is only one trespass in the declaration: and for this is cited the case of *Cheasley v. Barnes*. (a) Upon referring, however, to the statement of the declaration in the questions put by your Lordships, and also to that contained in the bill of exceptions, the

(a) 10 East, 73.

trespasses are in both charged to have been committed *diversis diebus et vicibus*, in which case it is admitted the plaintiff may reply and new assign, and although the precise terms of the new assignment are not stated, enough of it is set out to show that it states the plaintiff to have brought his action not only for the trespasses in the pleas mentioned, and thereby attempted to be justified, but also for that the defendant committed * trespasses at other times, and on other * 471 occasions, and for other purposes; under which, supposing it to be held that the seizing of the goods is justified under the pleas, the afterwards delivering them over to the defendants below instead of making the debt of them and paying the money over to the creditors, may be given in evidence; but admitting it to have been wrong to have applied and also new assigned, it seems to me that as the defendants below have not demurred, it is now too late to take advantage of the duplicity. If I am at all right as to the first point, the question as to the new assignment is immaterial.

MR. JUSTICE LITLEDALE. — On considering the question stated by your Lordships, for the opinion of the Judges, I felt a difficulty in giving an answer to it.

The action is brought for breaking into the plaintiff's house and taking his goods; and the justification is under a writ of *fi. fa.* to take the goods of A. B. Generally speaking, the plaintiff's goods could not be taken under an execution against the goods of A. B. But I must assume that the plaintiff has something to do with the goods in such a way as that they may be called his goods; and also that the property of the goods is in A. B., and that they are liable to be taken in execution absolutely; because, if the plaintiff had such an interest in them as that they could not be taken in execution absolutely, but only subject to any claim which he might have either by the goods being let to him, or pledged, or pawned with him, or by having a lien upon them; then, though the goods might have been seized *pro forma*, they could not be removed, and the defendant's plea of justification would fail altogether. And then, on the other hand, if the

goods were the property of A. B., liable to be taken in execution, the plaintiff would appear to have nothing but
 * 472 the possession of the * goods, and could not maintain an action against persons who stand in the place of the owner of the goods, and the sheriff might justify entering the plaintiff's house to take the goods.

But laying aside these considerations, the first point I notice is the allegation of excess. It does not appear that any excess was proved, and it forms no part of your Lordship's question. The next point I notice is, how far the new assignment bears upon the case; and as to that, I think a new assignment is not applicable to it. In case of a single trespass in the declaration, and a plea justifying it, the plaintiff cannot both reply and new assign, as that would be a double answer to the plea. *Cheasley v. Barnes*, (a) *Franks v. Morris*, (b) in the notes to that case; and *Taylor v. Smith*. (c) But in the present case the trespass is laid on divers days and times; and therefore, both in point of form as to the pleading, the plaintiff might new assign, and might also at the trial give in evidence trespasses committed on other occasions, and for other purposes than are alleged in the plea. Now, the occasions and purposes mentioned in the plea are the acts done in executing the writ of *fi. fa.*, and upon a denial and traverse of the facts stated in the plea, the plaintiff may show that the defendants did not do the acts complained of in executing the *fi. fa.*, for that is a part of the issue raised by the replication. What the plaintiff would propose to give in evidence under the new assignment, of other occasions, and for other purposes than those mentioned in the plea, is, that the acts of the defendants were not really done in execution of the writ, but for another purpose, and under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession
 * 473 of the goods. * It appears to me that that is the same thing as the traverse raised by the replication; and more properly raised in that than by making a new assignment. (d) In fact, the whole is one entire act, and may be

(a) 10 East, 73.

(b) 10 East, 81, n.

(c) 7 Taunt. 156.

(d) See *Oakley v. Davis*, 16 East, 82.

treated as one trespass, though different things were done on different days. I think, therefore, that the plaintiff could not maintain his action by resorting to the new assignment.

And in answer to your Lordships' question, as far as arises upon the plea and replication, I think that if the evidence was to prove that the goods were never seized in execution at all, then the plaintiff might show that the acts of the defendants were not really done under or in execution of the writ, but for another purpose, under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods. But if the goods were once actually taken in execution, then I think that evidence would not be admissible.

With regard to the first part of what I have stated as my opinion, I assume, though your Lordships' question does not so state, that the plea alleges that the goods in the plaintiff's house were liable to be taken in execution, and that such was the fact; and then the other general allegation in the plea which comes under the traverse, without the residue of the cause, is, whether they were taken under the writ; and that, I think, is a material point of traverse. At common law the *fi. fa.* had relation to the *teste*, and bound the defendant's goods from that time, so that if the defendant had sold the goods, they were liable to be seized in execution. This was altered by the Statute of Frauds, which enacted, that the property should be bound from the time of the delivery of the writ to the sheriff; the meaning of that is, that after such delivery, if the defendant make an *assign- *474 ment of the goods, the sheriff may take them in execution. But neither before nor since is the property of the goods altered, but continues in the defendant till execution executed; the execution is not executed till actual seizure under the writ, and till such seizure, in case of an act of bankruptcy, the assignees would have a preferable claim to the judgment creditor. But if the mere delivery of the writ to the sheriff was sufficient to constitute a seizure, then the inquiry at *Nisi Prius* which is now made, whether the seizure or act of bankruptcy was first in time, would be changed to

whether the delivery to the sheriff or the act of bankruptcy was first in time.

But it has been argued that the *virtute cuius* is not traversable, and I admit, that where the words *pretextu*, or *per quod*, introduce a consequence or inference of law from the preceding matter, they are not traversable, but that the preceding matter alone is so.

Many cases are referred to, as to that position, in the notes to 1 Wms. Saunders, p. 23. In the case of *Bennet v. Filkins, Saunders*, who was a counsel for the defendant, thought that the plaintiff would have objected to the traverse, because it was "without this that Kingswell was in prison by virtue of the warrant," and he said, that by virtue ought not to be traversed. And so also in *Greene v. Jones*, (a) where the defendant had shown that a bill of Middlesex was sued out, *per quod* the sheriff made his warrant, and so he had not alleged any thing traversable except the *per quod*. And the Court seems to have thought that the *per quod* was not traversable. And in the report of this case in 2 Keble, 607, the Court agreed that *virtute cuius* is not traversable, but only the issuing the writ, or, that he had no warrant. In * 475 *Beale v. Simpson*, (b) TREBY, * C. J., refers to this case of *Greene v. Jones*, as having decided that a *per quod* or a *virtute cuius* is not traversable. And he adds, "When one says that such a thing was done by virtue of a writ, it is meant by authority of the said writ, by operation of law, without any ingredient or mixture of matter of fact, and a mere matter of law is not to be traversed and tried by a jury." And he afterwards adds, "The *virtute cuius*, *per quod*, *pretextu*, or *vigore cuius* introduce a consequence of law only from the matters of fact before stated." And then he refers to several authorities which are stated in the report, where it is argued that the *virtute cuius* never introduces any new matter, but only collects the matter before. NEVILL and BLENCOWE, Js., agreed with POWELL, J., who had before delivered his opinion, that, generally, *virtute cuius* is not to be traversed, containing matter of law, but when it is mixed with fact, then it may be traversed; and in that case those

(a) 1 Wms. Saund. 298. (b) 1 Ld. Raym. 410.

three Judges held, against the opinion of TREBY, C. J., that the taking out of prison was traversable. In *Foster v. Jackson*, (a) the traverse was allowed; but that was after verdict, and therefore does not so much bear upon the point. In *Groenvelt v. College of Physicians*, (b) the traverse was, that the plaintiff was not arrested by virtue of the warrant stated in the plea, and that traverse was held bad. This case of *Beale v. Simpson* appears to me to unravel the whole of the mystery as to the *virtute cujus* and similar expressions not being traversable; that the reason is, that it only collects the matter alleged before, and draws a conclusion from it, and then being matter of law, it is not traversable. But where it is mixed with matter of fact, there it is traversable.

Now, in the present * case, if the law were that goods * 476 are to be considered as taken in execution by the mere delivery of the writ to the sheriff, then I entirely agree that the allegation, by virtue whereof the sheriff seized the goods in execution, would be an inference of law, and, therefore, not traversable. But as I am of opinion that the delivery of the writ to the sheriff does not in itself constitute a taking the goods in execution, I think the seizure of the goods, by virtue of the writ, is not a matter of law, but is a matter of fact, whether the sheriff seized by virtue of the writ or not; and, therefore, is traversable.

I may remark, that if any particular technical effect is supposed to be given to the words, "by virtue whereof," they are not a necessary allegation in the plea, and may be treated as surplusage. It would be sufficient to allege, after the making the warrant, that the bailiffs took the goods in execution. This expression, however, although to avoid the *virtute cujus*, comes really to the same thing; and the point in this part of the argument is, in effect, whether the delivery of the writ to the sheriff, in point of law, amounts to a seizure of the goods in execution, so as to say that the making of the seizure in execution, or under the writ, or similar language, is matter of law; if it does not, then it is matter of fact, and traversable.

(a) Hob. 52.

(b) 12 Mod. 386; 1 Ld. Raym. 454; Comyn's Rep. 76.

On the second point, I think if there was once an actual seizure that was an execution executed, and the evidence in your Lordships' question was not admissible. I do not think it can be inquired into what motive the defendant had for suing out the writ. If there was a valid debt and judgment, he had a right to sue out a writ of execution; and though his object might be by means of that to get possession of the goods, which he could not otherwise so easily have done,

and thereby to acquire some benefit for himself which * 477 he could not have * had but for the writ, I do not know why he cannot make use of a lawful proceeding to acquire that advantage. And that such motives and objects are not inquirable into, sufficiently appears from *Crowther v. Ramsbottom*, in which I entirely concur, if the writ be once executed.

The nature and object of the other purpose, and the claim, is not stated in your Lordships' question; and I am not at liberty to refer to the bill of exceptions, but must confine myself to the questions submitted to the Judges. But it does not appear from the question that the ulterior object he had in view was unlawful; and, therefore, if he execute a lawful writ, and it does not appear that his ulterior object was for an unlawful purpose, the only detriment that the plaintiff could sustain is, that the defendant has a better means of enforcing his claim. I do not see what damage, in point of law, the plaintiff has sustained.

But then it is said, though the mere delivery of the writ to the sheriff may not amount to execution of the writ, yet if the same person who is sheriff seizes the goods from quite a different cause from any thing connected with the writ, and which he shows to be different, both by his words and acts, yet, nevertheless, that is, in point of law, a seizure under the writ; and if an action of trespass be brought against him for the seizure, he may treat that seizure as a seizure under the writ, and justify accordingly. And several cases are cited, which, it is said, show the law to be, that if a man has two authorities to take goods, and he take professedly under one, he may afterwards justify in trespass, or avow for the other.

In *Butler v. Baker*, (a) it is said, that if a man takes a distress for one thing, yet when he comes into a Court of record he may avow for what thing he pleases; for which is cited Fitz. Abr. Avowry, 232. And so in an anonymous case in 2 Leon. 196, * A. distrains, and being * 478 asked for what cause he distrains, he assigns a cause which is not sufficient, and afterwards an action being brought against him, he may avow the distress for another cause. In *Groenvelt v. College of Physicians*, it is said by Lord HOLT, in giving judgment of the Court: "Suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one, for it is not by what he declares, but the authority he has is his justification." And then he goes on, what I have above mentioned from 3 Rep. 26 a, as to the distraining for one thing and avowing for another. In *Crowther v. Ramsbottom*, (b) Lord KENYON repeats what I have before mentioned, as to distraining for one thing and avowing for another; and he adds, that it appears the defendants were justified under the process of the County Court in entering upon the plaintiff, and taking his goods in order to compel an appearance, and therefore the question ought not to have been left to the jury to say whether they entered for that or for some other cause: and Mr. Justice LAWRENCE quotes what I have above mentioned from Lord HOLT, and adds, it was not essential to inquire what the the defendants said when they entered and seized, but only whether they had in fact a legal warrant to justify them.

These authorities are certainly very difficult to grapple with. I do not mean to say they are not law; because so old an authority as that is from Fitzherbert, continued down to Lord COKE and LEONARDS, and further continued to a more modern time, in *Groenvelt v. College of Physicians*, and again recognized and confirmed in *Crowther v. Ramsbottom*, I must either subscribe to or say they are not law; or distinguish them, so as to be able to reconcile the opinion I am now delivering.

I think that these cases are law; but I think the rule * should be confined to those cases where the seizure * 479 has been made under the process of the law; and then,

(a) 8 Rep. 26, a.

(b) 7 T. R. 654.

when a man seizes, where he has two rights of seizure, of goods or of the person, either under the process of Courts, or by distress as to goods, he may be taken to have seized or imprisoned under all the different authorities which he has at the time, and when he comes to justify in trespass or avow in replevin, he may use whichever of the authorities he thinks proper; and that rule would reconcile all the cases as to distraining for one cause, and avowing for another; and so also in *Groenvelt v. College of Physicians*, the rule laid down may well apply, because if a sheriff has a man in custody at all, he is, as a matter of law, in his custody, in all actions in which the sheriff has any process of detainer against the person; and therefore, if he have his custody by operation of law, the sheriff may justify under any process which he has against the party; and it is quite evident, from what is said in giving judgment in that case, that there was another writ or warrant besides, and that was the subject of the traverse. And in all these cases lastly referred to, there were two authorities; and, therefore, they fall within the restriction of the rule. In *Crowther v. Ramsbottom*, however, there was only one authority, and yet Lord KENYON and Mr. Justice LAWRENCE apply the same rule of law; but then in that case it was quite clear, that there was a seizure under the process of the Court, and that process was executed, and therefore the verdict was wrong, and there ought to be a new trial; and it very well might be, that if he seized under the writ, it should not be inquired into what his object was, whether to compel an appearance, or to compel the plaintiff to pay the debt and costs, and therefore, if he ever executed the writ, the law would say what was the effect of that; and it was not com-

* 480 petent * to inquire what his object or motive was in executing it. And, therefore, I admit, that that case may, in a certain degree, appear to militate against my opinion, because that opinion is only that the proposed evidence is admissible, to show, in fact, whether the goods were seized under the writ or not. But that was not the point there, which appears to be, as to the object he had in view when he executed the writ.

I may here notice, that some cases have occurred where
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two writs of *fi. fa.* have been delivered to the sheriff at the suit of different plaintiffs at different times, and the sheriff has seized under the second writ first, and questions have arisen as to the right of the plaintiff, under the first writ, to priority, and as to the liability of the sheriff; as *Smallcombe v. Buckingham*, (a) *Hutchinson v. Johnson*, (b) *Rybott v. Peckham*, in the notes to the same case, *Payne v. Drewe*, (c) and *Jones v. Atherton*, (d) in which last case, GIBBS, C. J., says: "The writ which first comes to the sheriff's hands must have priority, which shows that the second writ is to be considered as operating in favour of the first, and that when the sheriff has a writ in his office, though he issue no warrant on it, if he afterwards get possession by any other means, professedly, perhaps, under another writ, he must be taken to hold the goods under the former." In all these cases, there was an actual seizure under one writ or the other; and though in the last case, GIBBS, C. J., uses a very general expression, that if the writ be in the office, and the sheriff got possession of the goods by any other means, that must be taken to be in his character of sheriff, and not, as in the present case, under a claim, which, by your Lordships' question, I take to be wholly unconnected * with any legal pro- * 481 cess; this case falls within what is my opinion, that the rule should be confined to cases where both the authorities are under the process of the Courts or a distress.

For the reasons before given, I am of opinion, that whether the goods were taken in execution under the writ, was a matter of fact to be inquired of by the jury, and the evidence which your Lordships have mentioned, was admissible in support of the negative of the issue.

MR. BARON BAYLEY.—The preliminary facts upon which the question from your Lordships to his Majesty's Judges is founded are these: An action of trespass being brought against a sheriff and another person, for entering plaintiff's house, and seizing and taking away his goods on divers days and times, the sheriff pleaded a justification under a writ of

(a) 1 Ld. Raym. 251.

(b) 1 T. R. 729.

(c) 4 East, 528.

(d) 7 Taunt. 56; 2 Marsh. 375.

fi. fa., issued against the goods of A. B., at the suit of the other defendant, averring that the goods of A. B. were in the house, and that he entered the house to seize, and did seize and sell them under the writ. The other defendant pleaded the same plea, with the addition of the judgment recovered by himself against A. B. The plaintiff replied, admitting the judgment and the writ, and traversing the residue of the cause; and also added a new assignment at other times, on other occasions, and also alleging excess. At the trial, it appeared that the sheriff had made a warrant to his officers, who entered the house, and continued therein until all the goods were removed, which occupied three or four days, and that the sheriff was indemnified by the other defendant.

Upon this statement, the question your Lordships have proposed is this: Was it competent by law, upon these pleadings, for the plaintiff to show at the trial, in maintenance of his action, that the acts of the defendant * were not really done under, or in execution of the writ, but for another purpose, under another claim, and that the writ, and proceedings under it, were a mere colour and contrivance to get possession of the goods? And I am of opinion that it was.

There are three modes in which a plea of justification can be answered: first, by confessing the material facts it states, and by the introduction of additional facts, avoiding the effect the facts stated in the plea would otherwise have; secondly, by traversing all or some of the material facts the plea contains; thirdly, by new assignment. In the statement to which our attention is directed, the plaintiff has traversed and new assigned; and if the evidence offered was calculated to support either the traverse or the new assignment, it was competent in the plaintiff to give it. If it, that is, the evidence offered, is to be considered as confessing all the material facts stated in the plea, and introducing new facts in answer to the justification that plea would otherwise afford, it certainly ought not to have been admitted upon the traverse. We must see, therefore, what are the material facts stated in the justification; what, in the language of the traverse, is "the cause" alleged by the defendant for the

trespasses they profess to justify. The trespasses the defendants profess to justify are, the entry into the house, and the seizing of the goods; and the grounds upon which the sheriff professes to justify them is, that he had a writ, commanding him to cause to be made of the goods and chattels of A. B. a certain sum of money, that there were goods of A. B. in plaintiff's house; and thereupon defendant, under and by virtue of the writ, entered the house to seize them, and did seize and sell them. The other defendant states that he had a judgment, upon which that writ of *fi. fa.* was founded.

Now, what are the material facts alleged in these *justifications? Has the sheriff stated enough when *483 he stated the writ, and that there were goods in the house liable to be seized under it; or has the other defendant stated enough when he has added his judgment? Is it not essential that they should go farther, and state in fact that they did seize under it? Is there any instance in which such statement is omitted? Supposing nothing stated but the judgment and writ, and the fact that the goods were in the house, would it not have been an unanswerable objection that you have stated grounds which would have justified you, had you acted on these grounds; but you do not allege that you did act upon them. Suppose the plea had omitted the *virtute cujus*, and had stated only that defendants afterwards, and while the judgment and writ were in force, had seized the goods, would not your plea have been open to a special demurrer, on the ground that it did not state that they seized under or by virtue of the writ? Is it a consequence that because I have a judgment and writ against a man, under which I might seize his goods, I really make the seizure under such judgment and writ? I may have a conditional bill of sale from him of those very goods, and may seize under that bill of sale. I may be consignee of the goods from him, and may take under bills of lading he has sent me. The fact, then, that the defendant might have seized, and would have been warranted in seizing under a judgment and execution, does not exempt him from the obligation upon a justification, to state that he did so; and, if so, the fact of having so seized is an essential part of the cause stated in his

plea, and is liable to be put in issue, either by a general or by a special traverse. If the writ had been a *capias ad respondendum*, or other mesne process, and the sheriff had justified under it, or it was returned, he must not only * 484 have stated that he seized * under and by virtue of it, but he must also have stated that he returned it. *Freeman v. Blewitt*. (a) And why? Because the process will not justify him; he shall not be protected by it unless he shows that he paid a due and full obedience in acting under it. Salk. 409. So in *Middleton v. Price*, (b) where an officer justifies under process he ought to return, he must show he has done all it was his duty to do; and if he must show it, is it not a traversable allegation?

It is said, however, that to include a *virtute cujus* in a traverse is unwarrantable, and that the better opinion is, it cannot be done. Where a *virtute cujus* is a mere inference of law, drawn from premises previously stated, I agree it cannot be traversed; but where it is not a legal result, but a mere question of fact, I believe all the authorities are, that it may be traversed. If, for instance, you allege that A. was in custody of the sheriff, at the suit of B., and that C., who had a judgment against him, delivered a *capias ad satisfaciendum* against him to the sheriff, whereby he became, and was in custody of the said sheriff, at the suit of C., a traverse, that he thereby became in custody at the suit of C. would be clearly bad, because the law says, in such case, he does become in the sheriff's custody, at the suit of C.; and the traverse, therefore, would be the traverse of a mere matter of law. So, wherever a *virtute cujus* introduces a question of law only, from matters of fact previously stated, the consequence of law cannot be traversed, but the matter of fact must be the object of the answer. But where a *virtute cujus* introduces matter of fact, it may be, and continually is, included in a traverse. It was done in *Foster v. Jackson*; (c)

the point traversed was, whether the sheriff took J. S., * 485 * and had him in custody, by virtue of a *capias ad satisfaciendum*. In *Bennett v. Filkins*, (d) where the

(a) 1 Ld. Raym. 632.

(b) 1 Wils. 17.

(c) Hob. 52.

(d) 1 Wms. Saund. 20.

point upon the pleadings was, whether defendant, when he gave a bail-bond, was in custody under a warrant upon a writ returnable on a Friday, which was before the bail-bond was given, or upon a writ returnable on a Saturday, the day the bail-bond was given, the point traversed was, whether he was in custody by virtue of the warrant on the Saturday writ. And in *Beale v. Simpson*, (a) the question being, under which of the two writs of *habeas corpus* one B. had been taken out of the defendant's custody, the traverse was, that B. was taken out of defendant's custody by virtue of the former of the two writs, and this traverse was held to be well taken by POWELL, NEVILL, and BLENCOW, Js., against TREBY, C. J. So much stress, however, has been laid upon the opinion of Lord Chief Justice TREBY, that I think it right to show that it does not militate against the opinion I am humbly submitting to this House. Whoever will carefully attend to the opinions he delivered, will find that he does not put the case wholly upon the ground that every traverse, including a *virtute cujus*, is bad; for he admits the traverse in that case would have been good after verdict, and his objection rested, in part at least, upon the intricacy of that traverse, and the multiplicity of matter, that is, of fact and of law, which it contained; and he laid considerable stress upon the manner in which the case came before the Court, viz., upon special demurrer. The undue reliance, too, he places upon *Greene v. Jones*, (b) seems to me to diminish the weight of his authority, for he considers that that was a judgment in point, whereas there was no traverse there, only a *dictum* from *Saunders*, who was of counsel for the plaintiff. The *dictum* was, * "that defendant had only shown that * 486 a bill of Middlesex had been sued out, *per quod* that sheriff made his warrant, so he has not alleged any thing traversable, except the *per quod*, which is not traversable." The cases, therefore, of *Beale v. Simpson*, and *Greene v. Jones*, appear to me to furnish no reasonable grounds for saying that the including the *virtute cujus* in the traverse mentioned in your Lordships' question, affects the validity of that traverse,

(a) 1 Ld. Raym. 408.

(b) 1 Wms. Saund. 208.

or prevents it from including the question, whether the sheriff seized by virtue of the writ.

Two cases, however, were mentioned at your Lordships' bar, which I think we are called upon to notice viz., *Groenvelt v. Burwell*, (a) and *Crowther v. Ramsbottom*. (b) In *Groenvelt v. Burwell*, the defendants justified an arrest under a sentence and warrant; the warrant directed the officer to take the plaintiff and deliver him to the keeper of the gaol of Newgate; and the plea alleged that the officer did take him, by virtue of the warrant, and deliver him, with the warrant, to the keeper of Newgate, there to be detained, &c. The replication was, that the defendants took him of their own wrong, and not by virtue of the warrant. The replication, therefore, admitted, that the warrant had issued, that it was in the hands of the officer, and that what it required, viz., that the plaintiff should be delivered to the keeper of Newgate, had been effected under it. The defendants demurred, and the traverse was held bad: first, because, had the plaintiff been arrested by the officer under any other warrant, he ought to have shown it specially; and, secondly, because, though he had been arrested under any other warrant, he would in law have been arrested under every warrant the party making the arrest held at the

* 487 time; and consequently was, in point * of law, arrested under the warrant stated in the plea. That traverse, therefore, would have referred to the jury what upon the pleadings was a mere question of law, and was, therefore, upon the distinction I have made, clearly bad. In *Crowther v. Ramsbottom*, the defendant justified seizing the cattle under a warrant upon a *justicies* to compel an appearance in replevin, and alleged that, the plaintiff having appeared, the cattle were returned. The plaintiff admitted the *justicies*, but traversed the residue of the cause. It appeared in evidence that when the defendant seized, he had his warrant with him, and showed it, and that he returned the cattle when an appearance was entered; but there being proof that he said, at the time he seized, he was seizing for a debt, it was left to the jury to say whether the defendant entered

(a) 1 Ld. Raym. 457.

(b) 7 T. R. 654.

for the mere purpose of compelling an appearance, or whether for the purpose of compelling the plaintiff to pay the debt, and the jury found for the plaintiff. Now it was clear, that the defendant entered under the warrant; he had it with him and produced it, and the object the warrant was to answer, viz., to compel an appearance, was answered. If he had any ulterior purposes, viz., that of compelling payment of a debt, the pleadings were not calculated to raise that question. The only issue was, whether the residue of the cause stated in his plea, that is, having the warrant, and entering under it, were proved. The verdict, therefore, was clearly wrong; and the Court could not do otherwise than grant a new trial. But it is upon some expressions that fell from the Court that stress is particularly laid in that case; and in that case Lord KENYON says, "I never understood that a man was obliged to justify a distress for the cause he happened to assign at the time it was made; if he had a legal justification for what he did, it is sufficient; * a man may * 488 distrain for rent, and avow for heriot service. Here it appears defendants were justified, under the process of the county court, in entering upon the plaintiff, and taking his goods in order to compel an appearance, and therefore the question, whether they entered for that or some other cause, ought not to have been left to the jury; the verdict, therefore, proceeded on a mistake of the law." LAWRENCE, J., the only other Judge who spoke, referring to *Groenvelt v. Burwell*, as in point, observed, "that the Judge in the case in question had left to the jury what in *Groenvelt v. Burwell* was stated to be immaterial. For it was not material to inquire what they said when they entered and seized, but only whether they had in fact a legal warrant to justify them." Now, all expressions are to be considered in conjunction with the facts of the case in which they are used, and in *Crowther v. Ramsbottom* there was no doubt, not only that the defendants had the warrant under the *justices* at the time they seized, but that they seized under it, and enforced the obedience that writ required; at least there was nothing to show they had repudiated the right to refer to that warrant, as the right on which they acted. The expressions, then, of Lord KENYON

and Mr. Justice LAWRENCE, taken in conjunction with the facts of that case, go no further than this, that whoever seizes another's goods, and has a right by warrant, which it is his duty to execute, so to seize them, and applies that seizure to the purposes that warrant directs, is not precluded by any thing he says at the time of the seizure from so applying them. But that does not bear, as it seems to me, upon a case where an officer does not apply the seizure to the purposes of his warrant, but leaves those purposes wholly unsatisfied. Upon this ground, therefore, that in

* 489 * *Groenvelt v. Burwell*, and *Crouther v. Ramsbottom*, the warrant was ultimately pursued, and the thing it commanded was enforced, which was not the case here, it seems to me that those cases form no ground for impeaching the opinion that I am humbly submitting to the House. My opinion, therefore, is, that upon, the traverse *absque residuo causæ*, it was competent to the plaintiff to show that the acts of the defendant were not really done under or in execution of the writ, but for another purpose, under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods; and that what the writ required, viz., to cause the debt for which the judgment was obtained to be made, was never effected or attempted: and this being my opinion, it is unnecessary to say any thing upon the new assignment. I will only observe, that unless the plaintiff proves more trespasses than the plea, if unanswered, necessarily covers, he cannot both reply to the plea and new assign; he may do either, not both.

Judgment. June 25.

LORD WYNFORD. — Your Lordships must feel grateful to the Judges for the trouble they have taken to examine into this intricate case. It is, however, only intricate or difficult on the point with respect to the pleadings; for with regard to the justice of the case, it is impossible that any man who has filled the office of Judge, I had almost said, that any man whatever, could for a moment doubt. I hope that after a short time your Lordships will not be troubled with more of these questions upon pleading; I hope that the bill now

passing through the legislature will be adopted, and that the Judges will be enabled to prevent in future the justice of the case from being defeated by any accidental error of form in the pleadings. If your Lordships *were to * 490 reverse this judgment, justice would be defeated by formal objections, arising on the pleadings, and every one must lament such a result. One of the learned Judges has said, that he could not refer to the statements in the bill of exceptions. That is true; questions are put by your Lordships upon the law of the case, and the learned Judge has truly stated that he could not say whether the plaintiff would be injured or not, for the Judges are not supposed to be informed of the particular facts of the case on which their opinions in point of law are required by this House. Your Lordships are under no such restriction; you may look at the bill of exceptions, and there you will see enough to convince you that the plaintiff in the Court below would be grievously injured if he was not held entitled to recover. One of the learned Judges had spoken of the judgment of a late Chief Justice in the Court below. My Lords, I am that late Chief Justice; I have already delivered a judgment in this case; and I now state, that if the opinions of a majority of the Judges were against me at this moment, I should do what on other occasions I have done,—I should advise your Lordships to act on the opinion of the majority of the Judges and against mine. There would be no certainty in law if that course was not pursued. But I am happy to say, that a majority of the Judges concurred with the opinion I formed five years since in the Court below. I am sorry that the case has been so long pending, and I hope that that evil will soon be remedied. The case has been decided in the Court of Exchequer Chamber by eight Judges; only one of that eight now remains to assist your Lordships; all the rest have either retired from the bench or gone to receive the reward of their virtuous and useful lives. The case was in the first instance tried before Lord TENTERDEN, and his *judgment has been confirmed by eight Judges in the * 491 Exchequer Chamber. Four out of the five now consulted by your Lordships are of the same opinion, and but

for the opposing opinion of one learned Judge, the judgment of thirteen Judges would have been unanimous. For that one learned Judge I have the greatest possible respect, so much so indeed, that if this was a question upon the merits or justice of the case, and that that learned Judge differed as he now does from the rest of his brethren, I should not make the recommendation which I am about to make to your Lordships. His Lordship here stated the facts of the case, and then said : In my opinion there has been a dishonest and fraudulent attempt on the part of the defendants to possess themselves of these goods, and this attempt has besides been accompanied by an abuse of the process of a court of justice. If the goods were properly seized, it was the duty of the sheriff to sell them, and with the money thus raised to pay the sum for which the levy was ordered. Instead of that, Hopley and Lingham, who were the real parties (for the sheriff acted in ignorance of the facts and under the direction of these persons), conducted themselves as if they were the proprietors of the goods, and one of them swore that he was the importer. That is not dealing with the goods as the law would have dealt with them, and it is clear throughout that the only object in making use of the process of the law on this occasion, has been, to enable the defendants to cheat the plaintiff. It is not possible that any man can doubt what is the justice of the case. The plaintiff, then, is entitled to a verdict if there is no rule of law against him, and this brings me to consider the legal difficulties of the case. This is an action of trespass, in which the plaintiff states, that the

defendants entered his ship and unlawfully took his goods. * 492 goods. * The defendants admit that they have taken the goods, but they say that it was under an execution against a person of the name of Thornton, to whom the goods belonged. But Thornton had assigned his possessory right in these goods to the defendants, in consideration of the defendants paying freight for them ; they, however, think proper to treat them as the goods of Thornton, and they go on to allege, as a justification of the trespass, these important facts : [The noble Lord here stated the allegations of the return of the writ, the seizure, and sale of the goods, &c.]

The plaintiff states, in reply, that the defendants committed the trespass in the introductory part of the plea mentioned, without the cause alleged, &c. The fact is, that the defendants sold the goods on their own account, and the sheriff received instructions from them, that if the goods did not fetch a certain sum, persons whom they mentioned were to bid for and buy them in. The chief difficulty here is, whether the *virtute cujus* is traversable. That question has been well explained in the cases cited. If the *virtute cujus* raises a mere inference of law, it is not traversable. That is a rule of good sense. But if under this form of words a question of fact is raised, that question can only be tried by those who, by the Constitution, are judges of the fact — by a jury. The defendants say, that they were entitled to take these goods under the writ, and that all they did was done under the writ. It is true that they entered the ship by virtue of the writ, but they did not do all the other things by the same authority. The learned Judge to whom I have before referred has said, that what was done afterwards is not now in question upon these pleadings. I confess, my Lords, that I have my doubts upon that point. The sheriff had not done his duty when he had merely seized the goods. His duty required him to sell * them and to deliver over * 493 the money to the party at whose suit the writ issued.

It was necessary for him, if he justified under the writ, to show that he had not partly, but wholly, done his duty under that writ. The defendants have themselves put the plea, raising that question of fact upon the record, and they have no right to object to the other party showing whether that plea is true or not. The cases in 12 Modern and in the Term Reports warrant this doctrine. I fully subscribe to those cases. If a man has a writ which affords him a complete justification for all that has been done, though he has not done it with a view of obeying the exigency of the writ, yet having that authority, his justification is made out. Suppose one man knew that another had committed felony, and should, for private reasons, indict that other; though his motives in doing so might be most malicious, he would be justified if he proceeded exactly according to the forms of

law. In all the cases where the writ which the party has had, has been a justification for all that he has done, he has followed it exactly. If, therefore, the sheriff was completely justified by the writ in all that he has done in this case, I should, though I might lament it, advise your Lordships to set aside the judgment. But he is not so justified. The writ told him to enter and sell. Did he? No, he seized the goods and handed them over to the party at whose suit the writ issued. Taking, as I do, this view of the case, it would be a waste of your Lordships' time for me to go further in criticising all the cases that have been quoted. If your Lordships concur with me, you will affirm the judgment of the Court below.

The next question is, whether your Lordships will add any thing on the subject of costs. If it were possible that you could approve of the conduct of the parties in

* 494 *swearing that this was their property, when they had seized it as the property of another; if it were possible that you could approve of any merchants attempting to get property by cheating others (I can use no softer term) out of goods, which, though they might be of trifling value in New South Wales, were not so in England; I say, if it were possible that any noble Lord could approve of such conduct, I should say nothing about the costs. But I know that none of your Lordships can do so. The country is indebted for the state in which its commerce is, to the confidence reposed in the integrity of British merchants. That commerce would be no longer what it is, if that confidence were impaired. I submit that it is fit, therefore, that in all the cases in which conduct appears to have been observed that is likely to have the effect of making men withdraw that confidence, your Lordships should mark your disapprobation of it. I say again, that if my learned brother PARKE doubted upon the justice of the case instead of merely doubting upon the law, I should not ask your Lordships to do what I now propose. But he does not; and standing, therefore, as I do, upon the authority of Lord TENTERDEN, one of the most learned Judges that ever sat in a court of justice, and one whose love of strict and impartial justice was com-

bined with a temper in its administration that no man ever exceeded; I say, standing upon his authority and on that of seven of the Judges of the Court of Exchequer Chamber and of four of those who have now delivered their opinions to your Lordships, I think I may safely recommend you to affirm this judgment, with 200*l.* costs.

Judgment affirmed accordingly.

* APPEAL

* 495

FROM THE COURT OF CHANCERY.

NICOL v. VAUGHAN AND OTHERS.

1833.

WILLIAM NICOL *Appellant.*
 Sir ROBERT WILLIAMS VAUGHAN, Bart., and }
 Others } *Respondents.*¹

Bond. Gift. Principal and Agent. New Suit.

In a suit for administration of assets of obligors in a common money bond, the Master, under an order of reference made by consent, enabling him to inquire into the consideration and all the circumstances relative to the bond, reported that it was a voluntary bond, given as a bounty to the obligee. The representatives of the obligors, and the obligee, took exceptions to the report; the former alleging that it was a bond of indemnity, the obligee claiming it partly for money advanced, and partly for services performed. The Court below refused leave to withdraw the obligee's exceptions, and directed issues to try whether the bond was given for money and services, or as a gift, or for indemnity. This House on appeal reversed that order, and remitted the case to the Court below to decide these questions on the evidence before it. The Court below decided accordingly upon a

¹ S. C., 5 Bligh N. S. 505.

new hearing, and declared the bond to be partly for counter-security, partly as gift for services. This House, upon appeal, reversed that decision also, and ordered the Master's report to be confirmed. The Court below subsequently, upon the hearing of counter-petitions, one presented by the representative of the obligee, praying payment of the bond and interest, the other by the representative of the obligors, praying for leave to institute a new suit to impeach the bond, on the ground that a gift from a principal to an agent was invalid in equity, decreed for such suit, and granted an injunction against any proceedings on the bond in the mean time. This House, upon appeal, reversed that decree, holding that, as the respondent omitted to take advantage of any of the opportunities of raising that objection to the bond in the preceding inquiries, it was not now competent for him to harass the other party by a new suit, in which no new evidence could be produced.

June 17, 18; August 27.

THIS is the third appeal to this House between the same parties, from several successive decrees of the Master
 * 496 of the Rolls, respecting the consideration of a * bond, bearing date the 15th day of July, 1815, in which Lady Essex Ker and Lady Mary Ker became jointly and severally bound to Mr. George Nicol, of Pall Mall, bookseller, in the penal sum of 24,000*l.*, conditioned for securing the payment of 12,000*l.*, with lawful interest. The appellant is the son and legal personal representative of the obligee, who died in the early part of these proceedings. The respondent, Sir R. W. Vaughan, is the surviving trustee and executor of the will of Lady Essex Ker, who on the death of Lady Mary her sister, intestate, in 1818, was left her heiress-at-law and sole next of kin; and also, by obtaining letters of administration of her estate and effects, became her legal personal representative, and died in 1819. Of the other respondents, some are the coheirs-at-law of Lady Essex Ker, some her legatees or their representatives, and all are parties to suits instituted in the Court of Chancery in England, for the purpose of establishing her will and the respective claims of the parties to the real and personal property left by the Ladies Ker. There were also suits instituted between some of the parties in the Courts in Scotland, and in one of them Mr. Nicol obtained a decree on his bond, and a sum of money sufficient to answer the same was deposited in the Royal Bank of Scot-

land. The proceedings in those suits, and the circumstances relating to the bond, are stated in the report of the first appeal (2 Dow & Clark, 420), together with the judgment of this House, by which so much of an order of the Master of the Rolls, as directed issues to be tried to ascertain the nature of the consideration of the said bond, was reversed, with directions to remit the matter to his Honor to deal with it upon the evidence before him, instead of sending it to a jury. (a)

* In pursuance of those directions, the matter was * 497 again brought before the Master of the Rolls, and his Honor, by an order bearing date the 2d of December, 1831, declared that the bond was intended, to the extent of 10,000*l.*, as a counter-security to Mr. Nicol, in respect of his joining the Ladies Ker, as a surety in a bond to Messrs. Coutts & Co., their bankers, for 10,000*l.*; and that to the extent of 2,000*l.* it was intended as a voluntary gift or bounty to Mr. Nicol.

That decision became the subject of another appeal to this House, (b) which was heard in July, 1832, when their Lordships were pleased to adjudge, amongst other things, that so much of his Honor's order then appealed from, as declared the bond for 12,000*l.* to have been intended, to the extent of 10,000*l.*, as a counter-security to Mr. Nicol for his joint engagement with the Ladies Ker to the Messrs. Coutts, be reversed; and that the Master's report of the date of the 21st March, 1828, by which he had found that the bond was not a bond of indemnity, but a voluntary bond, given to Mr. Nicol as a bounty, be absolutely confirmed. (c)

(a) 2 Dow & C. 428, 429.

(b) Vide *supra*, p. 49.

(c) The Master, in that report, after setting forth the titles of the causes, and two successive orders of reference to him — by the latter of which he was to be at liberty to inquire into the consideration and all the circumstances relating to the bond, and the plaintiff, Sir R. W. Vaughan, was to be held at liberty to examine George Nicol upon interrogatories, and both of them were to be at liberty to examine any of the other parties in these causes, or witnesses, if necessary, relative to the said bond, and the said George Nicol was to be at liberty to exhibit interrogatories, for his own examination, — proceeds to the following effect: "I

* 498 * The appellant, and the respondent, Sir R. W. Vaughan, subsequently presented counter-petitions to

have been attended by the respective solicitors for all parties, and the said George Nicol hath laid before me an answer and examination to interrogatories, allowed by me, exhibited by the said plaintiff, whereby he states that the exhibit B. (being the bond in question) was prepared immediately, or very shortly, before the day on which it bears date, by Messrs. Blagrove & Walter, solicitors, who were the solicitors of the examinant, and that the examinant employed the said Messrs. Blagrove & Walter to prepare the same, and he is not aware that such solicitors had ever been employed by Lady Mary Ker and Lady Essex Ker, and he believes that they never had been employed by the said ladies, or either of them. And the examinant states, that he had for a long period, commencing from the death of John, late Duke of Roxburgh, the brother of the said ladies, in the year 1804, up to the date of the said bond, incurred much trouble and loss of time and considerable expense in the service and affairs of the said ladies, at their request and with their approbation, and had advanced and paid out of his own money various large sums of money from time to time to them, or for their use, and with their knowledge, which had never been repaid; and that no account was rendered by him to the said ladies of such expenses and sums; and with regard to some of his advances in money, memorandums or vouchers were taken by him at the time, but he kept no regular accounts with the said ladies at any time, and at the period of the execution of the said bond the whole of the memorandums and vouchers which he held for advances of money to the said ladies, were cancelled and destroyed in their presence, and no memorandum or voucher of any payment has been preserved by him; and the said examinant states that the said ladies intended by the said bond to remunerate the examinant for his said services, expenses, payments, and advances, and to satisfy the debt of gratitude which they conceived themselves to have incurred to the examinant, as well as the desire which they entertained of manifesting their friendship towards him. And the examinant states, that the consideration given by him for the said bond, consisted of such payments and advances of money and services, so far as such payments and advances of money and services amount in law to a consideration. And he believes that the said bond was given to him for such reasons, and no other; and that the same was, so far as appears from what he has herein deposed, given to the examinant as a voluntary bond, and so far as appears from what he has herein deposed, given to him in satisfaction of such existing debt as aforesaid. And the examinant states, that previous to the preparation of the said bond, the same was frequently mentioned in conversation between the examinant and the ladies Mary and Essex Ker, and that both the said ladies repeatedly desired and requested the examinant to get the said bond prepared, and that Lady Mary Ker, in the presence of Lady Essex Ker and of the examinant, pro-

the Master of the Rolls, respectively entitled in the
* causes pending in the Court of Chancery between * 499

posed and fixed the sum, viz., 12,000*l.*, for which the said bond should be given, and that such sum was approved by Lady Essex Ker. And the examinant states, that the obligations, both pecuniary and otherwise, under which the said ladies lay to the examinant, and their friendship, and the friendship of the said late Duke of Roxburgh for the examinant, were frequently mentioned in several conversations as the motives and reasons for their giving the said bond. And that such conversations did not, to the recollection of the examinant, pass in the presence of any person other than the examinant and the said two ladies, and he says he cannot more fully state the particulars of such conversations or when the same passed, and that, in fact, at the date of the said bond, money to a considerable amount, though far short of 12,000*l.*, was due from the said ladies to the examinant; for from the death of the late Duke of Roxburgh to the time of the execution of the said bond, when the said ladies were in want of money, they applied personally, or sent to the examinant for the same, and he has from time to time advanced what was needed by them, and such advances were sometimes made to the said ladies, or one of them, personally, and sometimes to other persons whose names the examinant cannot remember, on their behalf; and he states that he does not remember to which of the said ladies any of such advances was actually made, but the examinant always considered that his transactions with them regarded them both equally. And the examinant states, that on several occasions he did receive from the said ladies, or one of them, memorandums and vouchers in writing for payments and advances made to them; and that from time to time he received moneys from them, or on their account, which were partly retained or applied by him towards repayment of what had so become due to him, but unquestionably not so as ever to extinguish the debt due to the examinant, although the account between them, if attempted to be taken, must have been involved in great difficulty and obscurity. And the examinant says he is wholly unable to state what was the sum due to him from the said ladies at the date of the bond, or state further than he has herein stated the particulars of such debt, or when advanced, or to whom or on what account, or in whose presence each such sum had been paid; and he says, that for payments made to other persons, he frequently took receipts, not, however, that he is aware, expressing that the same payments had been made by him out of his own money. And the said examinant states, that he has in his possession various receipts for money paid on account of the said ladies, but he is unable to distinguish which of such receipts are for sums in which the said ladies stood indebted to him at the date of the said bond. And he had frequently, as he believes, though he does not remember the particulars, made applications to the said ladies for money, in consequence of the advances which he had made for them, but, except

the respondents. The appellant's petition prayed, that it might be referred to the Master to compute what was

as by the examination and by letters appears, he is wholly incapable to set forth what claim or demand, in respect of such debt as aforesaid, he had ever made against the said ladies, or either of them ; and he says, that he from time to time stated to the said ladies that he had demands upon them in respect of loans and advances of money, but not in respect of his services to them. And he states that he had performed such services from motives of friendship and regard, and never in any manner made any charge for such services, and never expressed to either of them any expectation that they were to pay him for such services. And the examinant states that the said ladies did frequently, previous to the preparation of the bond, speak to the examinant (but not in the presence of any other person that he remembers) on the subject of there being money, on account of the advances and payments aforesaid, due from them to him, and they did express their sense of the obligation they were under to the examinant, as well for the said advances of money, as for the services he had rendered them, and expressed a desire to remunerate him. And the examinant states that he was in the habit of acting as agent for the said ladies, so far as transacting various matters of business for them from friendship and at their request, and gratuitously, and not as manager for them ; and he saith that he was in the habit of receiving as well as paying moneys on their account, and that all the sums borrowed for their use for many years passed through his hands ; and he states that the reason why no account was made out or delivered or required, was, as he believes, that the said ladies were satisfied they were indebted to the examinant, but by no means intended to limit the amount of their bond by the amount of such debt, the existence of which constituted but one of the reasons for giving the said bond ; and he is wholly unable to set forth how much was considered as a gift and how much as the satisfaction of a debt, because the proportions were not ascertained ; and the examinant says that the said bond was at first proposed by the said ladies, or one of them, to be given for the sum of 10,000*l.*, and that the examinant offered no objection thereto ; and that Lady Mary Ker, not on the basis of any calculation, but of her free will, insisted that it should be for 12,000*l.*, which was consented to by Lady Essex Ker. And the examinant says that no person except the examinant was consulted by the said ladies, to the best of his belief, respecting the said bond, previously to the execution thereof ; and the reason was, that they had no solicitor whom they consulted about any of their affairs, except that they sometimes consulted Daniel Moore, Esq., about some matters relating to their brother's will, and being of very retired habits, they seldom saw any person out of their own family except the examinant. And the examinant says that he never advised them to consult their solicitors (not understanding them to have any) or any person with respect to the said

* due for interest on the bond, and that the same, to- * 500
gether with the principal sum of 12,000*l.* secured

bond, and that the propriety of taking any such steps never occurred to his mind, and if it had he should have had no objection whatsoever so to do. And the examinant says, that sometime before the bond was signed, the said ladies, or one of them, in urging him to accept said bond, stated that it would be paid at some time; and he says that there was no arrangement or agreement, nor understanding between the said ladies, or either of them, and the examinant, that he should not call for the principal upon the said bond, or the interest thereof, during their lives; but the examinant spontaneously mentioned to them, on the occasion of their executing the bond, that he should not ask them to pay any interest during their lives; and the examinant says, that independently of the said promise, the nature of the friendship between him and the said ladies, precluded, as he believes, the thought of their being personally sued or arrested by the examinant, or being called upon for the payment of the principal and interest of the said bond, before the means of such payment should come to them. And the examinant says, that he does not recollect that he ever explained to them, or either of them, the effect of the said bond, or that they might be sued and arrested upon it; but that unquestionably they understood the nature and effect of it, and they needed no explanation thereof; and he says that the said ladies, or either of them, to the best of the examinant's remembrance and belief, never said or expressed any thing relative to the said bond after the same had been given, except that they did both, as he recollects, express themselves happy and relieved of having, so far as lay in their power, rewarded his long and faithful services, or to that effect. And the examinant says, that the only reason, as he believes, of the same bond being dated and executed on the same day with the bond to Mr. Coutts for 10,000*l.* in the said interrogatories mentioned, was that the said ladies did not easily bring themselves to do any matters of business, and therefore it was deemed expedient to have both bonds settled at the same time. And the examinant says, that he was present at the execution of the bond, in which he is the obligee, and that the same was executed on the day of the date thereof, at the house of Lady Essex Ker, and that the parties present were the said Ladies Mary and Essex Ker, and the examinant, and William Butler, the attesting witness to the execution of the said bond, who was at that time in the service of Lady Essex Ker, and is since dead; and the examinant says he believes that there were other persons residing with the said ladies in the capacity of servants, at the time when the said bond was executed; and he believes that no person was residing with the said ladies of a higher station than that of a menial servant, or in whom they placed any confidence, or were in the habit of imparting their affairs to. And the examinant says that it was not the object, nor a part of the object, of the said ladies in giving him the bond,

by it, might be paid to him by the said respondent, or
 *501 that *the appellant might be declared entitled to

to indemnify him against the payment of the bond to the said Mr. Coutts, in which the examinant had joined with them as a surety, or against any sums which the examinant might thereafter advance for their use. And the examinant says, that he had no indemnity against his liability upon the said bond; and he says that being aware that the said ladies were entitled to a large property, although not of considerable immediate income, he did not conceive he stood in need of any such indemnity. And he says that out of the sum of 10,000*l.* which was secured by the said bond to Mr. Coutts, the prior bonds, in which the examinant had been surety for the said ladies, were discharged, and that the examinant was not, to the best of his recollection and belief, at that time liable for the said ladies on any other accounts, and accordingly he says that the amount of his liability for the said ladies at the time when the bond for 12,000*l.* was given, was the sum of 10,000*l.* secured by Mr. Coutts' said bond of even date therewith. And the said examinant says that he kept the said bond for 12,000*l.* in his own custody from the time when the same was placed in his hands till on or about the 20th of December, 1819, when he lodged it with the house of Coutts & Co., as a security for the sum of 3000*l.* then advanced and lent to him by Mr. Coutts; that beyond all doubt the said ladies understood by the effect of the said arrangement they were to pay both sums, and he knows that such was their understanding, because the bond for 10,000*l.* was given by them for money advanced for them, and the examinant joining therein was considered as a matter of form, and for Mr. Coutts' satisfaction; but the bond for 12,000*l.* was given by them upon their own proposal to secure to the examinant the sum of 12,000*l.* and interest, for the examinant's own use and benefit as aforesaid."

After setting forth the further examination of Mr. Nicol, and several letters from him to the Ladies Ker, put in by the respondent, to show Mr. Nicol was not in a condition to advance any money of his own at any time, and in two of which, of dates prior to the date of the bond, Mr. Nicol writes, that "he dare not look near Mr. Coutts," and that, "he had for several months studiously avoided him, for not having followed his advice in taking a counter-security," the Master concludes thus: "And I find that the said Lady Essex Ker, by her last will and testament, bearing date the last day of September, 1819, gave and bequeathed to the said George Nicol the sum of 2000*l.* in the following words: 'To my friend George Nicol, for his services, I leave 2000*l.*' And upon consideration of the said examination, the said letters, and the several circumstances hereinbefore stated, I am of opinion that the said bond under the hand and seals of the Right Hon. Lady Essex and Lady Mary Ker, was not a bond of indemnity, but was a voluntary bond given to the said George Nicol as a bounty by the said Ladies Essex and Mary Ker, with-

receive the same out of moneys set apart by order of the Court of Session in Scotland, in the suit instituted there, to * cover the amount due for principal, interest, and costs of the said bond. The respondent's petition prayed, that he might be authorized to institute a suit in the * Court of Chancery, for the purpose of impeaching the validity of the bond, so in effect declared by this House to be a gift without consideration (upon the ground, * that if a gift, its validity was questionable, on the principles of Courts of Equity, applicable to parties standing in the relation of principal and agent); and that the sum set apart by the Court of Session be secured to abide the event of the proposed suit; or, as an alternative, that the appellant might be restrained by a perpetual injunction from taking out execution on the bond, or putting the same in suit.

Both these petitions were brought on for hearing before the Master of the Rolls; (a) and his Honor, by an order made on the 14th of February, 1833, directed that the respondent, Sir R. W. Vaughan, should be at liberty to institute a suit in the Court of Chancery for the purpose of questioning the validity of the bond, taking it to be a bond intended as a bounty or gift to Mr. G. Nicol, in pursuance of the judgment of the House of Lords; and that the appellant, as the administrator of the obligee, should be restrained by injunction from receiving, out of the sum set apart by the Court of Session, the amount claimed to be due on the said bond.

Against this order the appellant now appealed to this House.

* *Sir Edward Sugden* and *Mr. Tinney*, for the appellant. — This is the second time we have to complain that the Master of the Rolls did nothing in this matter but direct new litigation. There is not an instance known of three successive appeals to this House on this same point.

out any consideration having been paid or given by the said George Nicol for the same."

(a) See *Earl of Winchelsea v. Garretty*, 1 Myl. & K. 253.

Your Lordships have already reversed two former orders of his Honor. The tendency, if not the direct effect, of this third order now appealed from, is to impugn the orders of reversal, and is a departure from all the former proceedings relating to the bond. One ground alleged for instituting a new suit, after the adjudication of your Lordships, which ought to be final and conclusive, is, that until the bond was by your Lordships' judgment established not to be a bond of indemnity, but a voluntary bond, the respondents had not an opportunity of discussing its validity as a gift. But they had the opportunity and power to enter into a full examination of that question before the Master. They did not choose to do so; if they did, we had a full defence on that point.

Under the order of the Court of Chancery of the 28th of April, 1827, the Master was at liberty to inquire into the consideration of the bond, and into all the circumstances relating to it; yet by the report made in pursuance of that order, and bearing date the 21st March, 1828, the Master did not find, nor did any of the parties then suggest, that the validity of the bond was questionable on the ground which is now for the first time alleged. The direct and express object of that order of further reference was to enable the Court to decide the question in dispute respecting the consideration of the bond, without the expense and delay of a new suit in equity. Under the first order of reference, Mr.

Nicol, allowing, at the request of the respondents, a * 506 stop to be put to his proceedings on * the bond in the Scotch Courts, brought his charge in respect of it before the Master in Chancery. The solicitors for the respondents then raised the question of the consideration of the bond, alleging that it was a bond of indemnity to cover Mr. Nicol's engagement to Messrs. Coutts & Co. on behalf of the obligors; that was the only objection then made by them. The Master not feeling himself authorized to inquire into the consideration, the second order of reference was moved for by the respondent, and Mr. Nicol consented, and the order was accordingly made, and the master was thereby directed "to inquire into the consideration and all the circumstances relative to the bond." Can it be now therefore alleged that

the respondent had not had an opportunity of questioning the bond as a gift? The order of his Honor, directing issues to a jury, was reversed by your Lordships' House upon grounds which are equally applicable to the question before you now, namely, because it was a departure from the consent order of reference, and because there was no person in existence who could give additional evidence respecting the bond. This last order of his Honor is open to the same objections, and cannot be right unless your Lordships were wrong in reversing the first order.

Mr. Nicol did not, it is true, produce any settlement of accounts when he accepted the bond. The Ladies Ker most probably might not have wished it. They would not look into such accounts: they had too much reliance on Mr. Nicol to examine accounts with him. In his examination Mr. Nicol was drawn aside from the point now raised, by the respondent's insisting that the bond was for indemnity, and making no other objection to it. There cannot be any question now that the bond was not for indemnity, for the Master by his report found that it * was not a bond * 507 for indemnity but a voluntary bond; and your Lordships, by the judgment of this House in the second appeal, ordered that report to be absolutely confirmed. The objection now made to the bond is, that taking it to be voluntary it is impeachable in equity, on account of the relation in which Mr. G. Nicol stood to the Ladies Ker. But the respondent having all along in the whole course of the various proceedings relied upon the other single objection, ought not now to be allowed to shift his course. We confidently submit that where, as in the present case, a party relies upon two distinct defences, and all the facts necessary to raise and to enable the Court to determine both grounds of defence are before it, such party cannot be admitted first to abandon one of his defences, and carry his opponent through a long and expensive course of litigation confined to the other, and when his case fails him upon the ground he has selected, to reassume the defence he had abandoned, and commence in effect an entirely new course of litigation.

The respondents, alleging that the Master's report does

not exactly accord with Mr. Nicol's account of the consideration for the bond, say, your Lordships did not give credit to Mr. Nicol's examination, because your Lordships confirmed the Master's report. The inference they draw does not necessarily follow. There is no doubt of advances of money being made by Mr. Nicol on behalf of the Ladies Ker. Mr. Nicol swore the bond was given for money advanced, and for services performed by him as a friend. The Master said that they were not such services as make a consideration for the bond. But may they not entitle him to a gift? Mr. Nicol, they say, could not accept a gift. What prevented

* 508 Mr. Nicol from taking the bond as a gift? * We are prepared to go into that point, if your Lordships think it should be entered upon. The observations of Lord ELDON, in the case of *Harris v. Tremeneere*, (a) clearly establish the validity of this bond. His Lordship in that case said, "the consideration as to the other voluntary leases stands upon different principles, as they are pure gift," &c. "I cannot find any decision authorizing me to say that the defendant should not have taken these leases as of the pure gift of his employer." There could not be a stronger case than that in which the person who took the leases was a steward, bound to do every thing for his employer. There is nothing in the cases of *Huguenin v. Baseley*, (b) or *Griffiths v. Robins*, (c) to affect the validity of this bond.

[*The Lord Chancellor* observed, that the question now was not whether the bond was valid or not, but whether a new suit should be instituted to discuss that question.]

Supposing even that the respondents had a good case against the validity of the bond, which we deny, still we submit to your Lordships that the Master of the Rolls was wrong in ordering a new suit, thereby taking this case out of the course of proceeding already adopted as the fittest for its adjudication. It would, indeed, answer the purpose of the respondents to have such suit, for they would then exclude

(a) 15 Ves. 34, 39.

(b) 14 Ves. 273.

(c) 3 Madd. 191.

the evidence of Mr. George Nicol; for he is dead, and his evidence in the existing proceedings would not be read in the new suit. If your Lordships think further inquiry necessary, for trying this point, you may direct such inquiry to be made upon the evidence now in the suit. But as no new evidence can be brought, there is no reason to put parties

* to the costs of another suit in which there cannot be * 509
a better investigation than has already been had.

Mr. Pemberton and *Mr. Hope*, for the respondents. — The first question for your Lordships' consideration is, whether you will set aside the order of the Court below. The second is, whether the parties ought to be precluded from further investigation into the transactions relating to the bond. It is mistaking the principles of Courts of Equity, to suppose that the restriction against gifts of this nature is confined to attorneys and agents; your Lordships will find that, not only persons in the relation of attorney, of agent, of guardian, trustee, and steward, but all persons in a situation that gives them advantage or influence over a party, cannot take a gift from him, while such relation between them continues. *Proof v. Hindes*, (a) *Welles v. Middleton*. (b) Lord THURLOW, in his very elaborate judgment in the latter case, said, "It has been argued as if it was necessary to establish incompetency in this man, that rendered it impossible for him to convey; but this is not so. There are many instances where this Court is obliged to act for the preservation of mankind. The presumptions arising must be refuted by the strongest evidence. What is the case of expectant children anticipating gifts by sales? They go on general principles. So the cases of trustees, and guardians, and so of attorneys." That the principle applied to the case of an attorney, is applicable to any other party, placed in a confidential relation giving him influence over the person who makes the gift, is also clearly laid down in the cases of *Gibson v. Jeyes* (c) and *Hatch v. Hatch*. (d) In the former, Lord ELDON said (p. 278), * "The rule is, that he who bargains in mat- * 510

(a) Forres. Ca. Temp. Talb. 111.

(b) 1 Cox, 112-125.

(c) 6 Vess. 266.

(d) 9 Ves. 292.

ter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence,"—a rule applying to trustees, attorneys, or any one else. In *Hatch v. Hatch* he extended the rule to guardian and trustee, saying (p. 296), "This case proves the wisdom of the Court in saying it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for the execution of antecedent duty." "And recollecting that, in discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, inquiry is so easily baffled in a Court of justice, that instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression." "And, therefore, if the Court will not watch these transactions, with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud; where the connection is not dissolved, the amount not settled," &c. The principles thus laid down in those cases were acted upon in the subsequent cases, *Huguenin v. Basely*, (a) *Wood v. Downes*, (b) *Montesquieu v. Sandys*, (c) and *Griffiths v. Robins*, (d) and is not departed from in the case of *Harris v. Tremeneere*, (e) cited for the appellant, or in the later cases of *Lord Selsey v. Rhoades*, (g) or *Pratt v. Barker*. (h) The rule in all the cases is, that in respect to contract or bargain, the relation must be dissolved, and

* 511 the parties must place * themselves as it were at arms' length, in the position of strangers; and in respect to gift, the person conferring it must know what he is doing, and the effects and consequences of it. It should be made to appear to your Lordships, that the obligors, when they executed this bond to Mr. Nicol, understood the obligation in all its bearings; that it was for services or for money, or as a gift, and that they could be arrested on it; that, in short, they knew all the consequences of what they were doing.

(a) 14 Ves. 273.

(b) 18 Ves. 120.

(c) Id. 302.

(d) 8 Madd. 191.

(e) 15 Ves. 34.

(g) 2 Sim. & Stu. 41.

(h) 1 Sim. 1; 4 Russ. 507.

Mr. Nicol himself, in his examination, says that he did not explain to them that they might be sued or arrested on the bond; that the nature of the friendship between him and the ladies precluded the thought of the ladies being personally sued or arrested by him. He says they knew the nature of it, and needed no explanation. He did not tell them he had accounts against them, but he swears he had memorandums and vouchers for large amounts advanced for them; but that all these were destroyed at the time of executing the bond. He swears, in effect, that he had a legal demand on them, and legal evidence to support it; but that he destroyed the evidence. By his own account, he stood in the relation of agent and guardian to the ladies, and took from them a bond for 12,000*l.* for his own benefit, although they had not a pound but what they borrowed for their immediate necessities; and your Lordships are called upon to affirm this bond as a gift to him. If it could be ascertained that Mr. Nicol knew what he was swearing to when his examination was taken, he being then on his death-bed, it would not be difficult to say that this was a case of actual fraud. He was not examined sentence by sentence, but a written statement being presented to him in his last moments, he put his name to it. The bond was prepared by Messrs. Blagrove & Walter, * his own solicitors, who were strangers to the * 512 obligors, and was accepted without calling on the solicitor for the ladies, who then had a solicitor, Mr. Moore, employed by them upon most important business. Was it not the duty of Mr. Nicol to call on that gentleman, or on the gentleman who drew the bond of even date for Messrs. Coutts? He swears he did not explain the effect of the bond, except that it was for 12,000*l.* with interest, as they directed, and the friendship between them precluded a thought of their being sued on it. But though Mr. Nicol would not take proceedings against them, his assignees might if he became bankrupt or insolvent. Did he explain that to them? If Mr. Nicol did not explain all these possible effects of the bond, he did not do what he was bound to do before he accepted it; and your Lordships cannot declare this to be a valid bond, unless you depart from all the former decisions

of the Courts of Equity, and of this House, upon like instruments.

The letters written from time to time by Mr. Nicol to the obligors, during the two years preceding the date of the bond, and put in evidence in the case, will show how unlikely it was that money advanced formed any part of the consideration, or that the obligors were in a condition to make such a gift. In one he says, "If Mr. Parkes will call on me with his bill of 279*l.*, I will either get Coutts to accept it, or accept it myself; or if in distress, I will raise the money for him; for though as poor as a rat myself, my credit is without end." In another letter, February, 1813, he writes, "I had a long interview with my old friend 'Tommy' (Coutts), and was graciously received, considering that I was a borrower; and as soon as our joint bond is made for 2000*l.*, I will bring it to you for execution. I shall then get up

* 513 *and cancel our notes for 1100*l.*, the money you have overdrawn." In another, dated in March, 1814, he writes to Lady Essex Ker, "As my friend Mr. Coutts is upwards of fourscore, and I can have no dependence on his junior partners, who would certainly lay hold of me; they have already sent me notice that they are so much in advance, besides what I have given them security for, that they can answer no more of your ladyship's drafts." In another, dated March 13th, of the same year, he writes, "Nay, I went further, and became security, either by signing my name, or pledging my honour for a great deal more than I am worth in the world." March 16th, 1814, he writes, "I send your ladyship the note inclosed for 500*l.*, which I mentioned in my letter, for your signature above mine; and this I believe is as far as the house will go, for they know very well that I do not pretend to be a man of property, and to draw down upon themselves Scotch law suits is what they will never agree to." In another, dated August 22d, 1814, "I have had Captain Garretty with me, with your ladyship's acceptance for 380*l.*, to get discounted. I have been with a friend for that purpose, but unfortunately he is not in cash at present, and I dare not look near Mr. Coutts, having so shamefully set his advice at nought. But I will, if I can,

endeavour to get it done with some other friend." In a letter to Lady Mary Ker, dated the 3d of January, 1815, he says, "I would to God you would inspire Lady E. with the thousandth part of your ladyship's discretion and delicacy, in money matters. I confess I was shocked at the indelicacy of leaving me in the hands of the Philistines, whom I had made my mortal foes by my zeal and exertions for her interest, *and became bound for her in sums far be- * 514 yond my power of paying, when simply signing her name would have obviated all."

Here it appears a little extraordinary, that a lady, who refuses in January to relieve him from a security by merely putting her hand to paper, gives him a bond for 12,000*l.* as bounty in the same month. In a letter to Lady Essex Ker, on the 28th January, 1815, Mr. Nicol writes: "I have not seen Mr. Coutts for several months, having studiously avoided him, because I had not followed his advice, so friendly to all parties, in taking a counter-security; but I must now say, that I had so near a prospect of your ladyship's getting possession, that I thought it became unnecessary." In another, dated April 19th, 1816, he says: "As I know your ladyship's demands are peremptory, I have got 1000*l.* from a friend for a few days, and passed my own word, which is always my bond, to return it before the week is out; your ladyship will be so good as send a line by the bearer that you have received the money. I am quite mortified at this business, for having seen most of the creditors, I had convinced them that it was impossible your ladyship could pay the principal of their debts till you could either sell or raise money upon mortgage, but that their interest should be regularly paid them; this seemed to satisfy them, and how they have changed their minds I cannot tell; but I am apprehensive that some of the other creditors, finding that compulsion has been successful, will pursue the same course, in which case I I know not what is to be done." In another letter to her, dated November 13th, 1816, "I have had a very threatening visit from Mr. Dobie's partner with a demand for 1000*l.*; I have got him put off a little with the old story, which I confess * my conscience smites me for so often * 515

asserting, viz., that your ladyship's debts are very safe, and will eventually be paid. I am so sensible of the contrary, that I look to end my life in a prison the moment any thing happens to your ladyship or Mr. Coutts."

How can it be said on the part of the appellant, that this bond was only commensurate with the liberality of those ladies, when it thus appears that at the very time of its execution, and for a year before and a year after, they were obliged to borrow money, and were so much in debt that it was doubtful whether those debts could ever be paid? The question now is, whether there is not, upon these facts in evidence, such a case made out as to require a further investigation of the bond, and of the circumstances under which it was given.

But it is contended for the appellant, that we are now too late; that we are precluded from further investigation by our own conduct, and that we should have argued the matter before the Master, under the order of reference. Your Lordships will be of opinion, on looking to the course of the proceedings, that we have taken steps as soon as we could to make the inquiry which we ask. Mr. Nicol said before the Master, that the bond was given him for moneys advanced and for services performed, not for indemnity nor as a voluntary bond. But the Master found that it was a voluntary bond.

[THE LORD CHANCELLOR. — How can it be said that the issue before the Master was indemnity, or not indemnity, when the order of reference was in such very general terms, "to inquire into the consideration and all the circumstances?"]

The issue was not confined to indemnity or not indemnity, or to voluntary or not voluntary: both parties agreed in repudiating the bond as voluntary, and both excepted * 516 to the report, * finding it to be voluntary.

[THE LORD CHANCELLOR. — Could you not have raised your present defence when the Master reported that the bond was voluntary.]

The Master had no power to inquire further than he was directed; he was not directed to find whether the bond was valid or not valid; all he was directed to do was to inquire into the circumstances under which it was executed. He only found a fact, but was not authorized to report what the law was on that fact. Two questions arose on the report: the first was, whether the Master was right in the fact found, and the Master of the Rolls not being satisfied that he was right, directed a further inquiry by issues. Your Lordships differed in opinion from the Master of the Rolls, and you affirmed the Master's report, finding that it was a voluntary bond. That was the first time that we could apply ourselves to the second question raised on the Master's report, which was a question of law; being, whether the bond given as a voluntary bond, under the circumstances reported, was legal. That question could not be brought before the Court below on the Master's report, because the Master could only report on the facts referred to him. Now that your Lordships have affirmed the finding of the Master, we raise the question of law on the facts so found and affirmed, and we impeach the bond as invalid. The appellant, instead of putting in an answer to our bill impeaching his bond, comes here and asks your Lordships to stop all further inquiry, a course which he would not pursue if he had no further evidence or documents to explain against himself the circumstances under which the bond was given. We do not believe that he has not such evidence. We ask for further investigation, because at present the bond appears to have been made under circumstances which would induce a Court of Equity to * set it aside, upon the principles which are universally * 517 applied to gifts to persons standing in a relation of trust or confidence towards the donor; and because there is, at all events, so much suspicion as to the circumstances under which the gift was made, as to make it fit that further investigation should be had.

Sir Edward Sugden, in reply. — It is part of my argument against a new bill, that the appellant was drawn off and precluded from argument on the bond as a voluntary bond. The

respondents allowed our exception to the report to be withdrawn, and in that they acted with bad faith; for we could then show that it was a bond for valuable consideration. There is not a tittle of evidence to impeach the bond on that ground. It is said, this is an attack on the doctrines of the Courts of Equity, because we do not agree in all the doctrines of the Master of the Rolls. With great respect for that learned Judge, I do not agree in all his doctrines, and I have excepted to many of them. The respondent's proposition is this: that for services of the most essential kind, rendered for a period of twenty years, if the person to whom such services are rendered, be he or she ever so able and willing, make a gift to the person rendering those services, such gift cannot stand. Has not Lord ELDON said over and over again, in the cases already cited, that if it is pure gift no Court can interfere? But the respondent says, it was not a pure gift, it was not voluntary. He precluded himself from taking that objection, by relying on a totally different objection. We say, this is a voluntary bond. Is not Lady Essex Ker to be supposed capable of a free gift for such services as Mr. Nicol performed, when we see her by her will bestowing her fortune upon hospitals and churches; when she is, in

* 518 fact, looking about for objects of her bounty? It * was urged as argument on an inference of fraud, that this bond was never enforced during the lifetime of the obligors. That was agreed on; Mr. Nicol swears, that he told them he would not enforce it during their lives, not even for the interest. Another argument to infer fraud is, that the bond was never made known to Mr. Coutts. That was the best proof that the Master of the Rolls was wrong in declaring it to be for indemnity. If the bond was given to indemnify Mr. Nicol for his engagement for the ladies to Mr. Coutts, is it to be believed that he would not have knowledge of it? Another objection made was, that Mr. Nicol did not tell the obligors that if he should become bankrupt his assignees might sue and arrest them. Now, could they be ignorant that they were liable to all the consequences of giving the bond to Mr. Coutts? They knew that they were liable to the like consequences for both bonds. With respect to the expression

"poor as a rat," in one of Mr. Nicol's letters, that is a common expression, not implying poverty, but often used by persons rich in money as well as credit; and we find that Mr. Nicol's assets are sworn to be 36,000*l*. The inference, that Lady Essex Ker would not make a gift of this bond, because she had by some neglect omitted to put her name to some paper, and Mr. Nicol complained of being put in jeopardy by such neglect, is the most far-fetched argument that was ever heard. I contend, that they might have raised the question of validity under the order of reference to the Master, and the Master would not be prevented from drawing the conclusion of law on the facts. They had another opportunity of raising the same question before the Master of the Rolls, when this House confirmed the Master's report finding this bond to be bounty. The appellant petitioned the Rolls to confirm the * report; that was the last time * 519 that they might have raised this question. Either then, or when the inquiry was before the Master when they had two defences to the bond, they ought to have brought them forward. They are not now entitled either to a supplemental bill or bill of review, because they cannot swear that they did not in the former stages know of this defence. Then what right have they to ask for leave to institute a new and distinct suit, after so many years of litigation, to harass the appellant, who may not be able to contend against funds which are supplied to the other side out of the estate of the obligors?

THE LORD CHANCELLOR. — I shall move your Lordships to postpone your judgment until I shall have the assistance of my noble and learned friend Lord LYNTHURST, who was with me on hearing the first appeal in this case. I will lay before him my notes of the argument.

August 27.

THE LORD CHANCELLOR. — My Lords, this case, which was an appeal on various grounds, now comes on, I hope and trust, indeed, I think I may confidently state, for the last time, to receive decision from your Lordships. In October,

1831, your Lordships reversed an order of his Honor the Master of the Rolls, directing three issues to be tried at law,¹ on the ground that the evidence was all before the Court below, and that the Court below could then dispose of the question, which was, whether or not the bond was an indemnity, or counter-security, or gift. The Master of the Rolls then considered that question, and came to the conclusion, that as to 10,000*l.* the bond was a counter-security, and as to

2000*l.* it was a voluntary gift in remuneration of services. In July, 1832, your Lordships reversed the

declaration as to the counter-security, and confirmed the Master's report absolutely, which had found that the whole bond was voluntary, and a gift and bounty from the obligors to the obligee. Upon this both parties petitioned the Court below; the respondents, for leave to institute a suit to impeach the validity of the bond considered as voluntary and gift, and for an injunction to restrain the appellant from receiving any portion of the money set apart in Scotland for the payment of it; the appellant, for computation of interest due upon it, and for leave to have that and the principal paid out of the Scotch fund. On both petitions, the order now appealed from was made. It gave the respondents the leave they asked to impeach the bond in a new suit, taking it to be bounty or gift, and it ordered the appellant's petition to stand over in the mean time, restraining him from receiving the money. That the Court below had the power to make this order there cannot be any doubt; it was in the discretion of the Court, but a discretion to be exercised soundly; and the question is, whether or not, in the circumstances of the case, that discretion ought so to have been exercised as to grant the leave; in other words, whether your Lordships, having before you the case which was before the Court below, sitting in this Court, would have given the leave which the Court below did give by the order; and I am of opinion that your Lordships would not and ought not to have given that leave.

The case set up against the bond, and set up for the first time, is that from the relation subsisting between the parties,

¹ See *ante*, 49 and cases in note (3).

a Court of Equity would not suffer the obligee to take advantage of the obligors' bounty. Now this case might have been made in all the former stages of the long litigation, to the end of which it * may be hoped we are now * 521 approaching. The objection now first relied on was one, which was open to the respondents from the beginning; at all events, from the Master's report, and it would have decided the cause in their favour, whether the rest of the case had been with them or against them. They then, and long afterwards, relied upon the wholly different ground, of which the decision of this House has deprived them, namely, that the bond was a counter-security. But if the bond was good for nothing as a gift, they ought to have urged that alternative, and said, "whether it be indemnity or bounty makes no difference; for if indemnity, *cadet questio*, and if bounty, it cannot be supported in a Court of Equity, regard being had to the circumstances, and the relation in which the parties stood." But, my Lords, a party cannot be allowed to bring forward his case piecemeal,¹ and after exhausting his adversaries with litigation on one ground, to drag them through a second course of proceeding upon another ground, of which he might at first have availed himself. Then, was there any thing in the proceeding, whether in the conduct of the appellant or in the orders of the Court, which misled the respondents, and prevented them from taking earlier the objection on which they now rest their case? I am very clearly of opinion that the more the whole proceedings are attended to, the more plainly will it appear that the respondents have no such matter to urge. If the contention had always been, on the one side, that the bond was indemnity, and on the other, that it was for a valuable consideration, and if nothing had been done, either by the parties or the Court, to direct one another's attention to the bond considered as voluntary and bounty, there might be some ground for the application of the respondents to be now let in with * a new * 522 case, referable to the bond as voluntary and bounty. But that is not the fact; it is the reverse of the fact. First, the Master's report in 1828, while it negatives the bond being

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 330, 331.

indemnity, distinctly finds that it was voluntary and given as a bounty. Secondly, the respondents excepted to that finding of the Master, upon the ground that the bond was not voluntary, but indemnity; and the exception of course proceeded upon the assumption that it was not only not voluntary, but also not given for value. Thirdly, the appellant took an exception to the finding of voluntary, maintaining, it is true, that it was for value, but he desired leave to withdraw that exception; and though this was refused by the Master of the Rolls, declaring that the appellant was bound by the terms of his exception to support the bond as partly for services and partly for money lent, he thereby gave sufficient intimation to his adversaries that he was satisfied to rely upon the bond as a gift, provided it were found not to be a counter-security. Fourthly, the frame of the issues then directed, that is, on the 29th June, 1829, most distinctly called the attention of the respondents to the materiality of their present objection; for one was to try the question, given for value or not, another to try the question, indemnity or not, and the third to try the question, bounty or not. (a) It cannot surely be contended that they ought not to have been prepared for the event had the issues been tried—the event, I mean, of the first being found against the appellant, and the second and third in his favour, that is, the effect of the whole matter being found by the jury, as it is now placed by the decision of this House, confirming the Master's * 523 report, and establishing the * bond as voluntary and a gift. And fifthly, though this House in 1831 reversed the order directing the issues, it also gave the appellant the leave, which had been refused below, of withdrawing his exception to the report. This is, in my view of the case, very material; for this leave given, and of course taken, to withdraw the exception, placed the case in October, 1831, exactly as it would have been if no exception had been taken by the appellant upon the ground of the bond being for value, and left the parties contending thus: the one that it was indemnity, the other that it was bounty; and therefore, it is manifest that there was no third or middle term, nothing to

(a) See 2 Dow & Cl. 425.

be considered but those two alternatives, that the only question now was between indemnity and bounty, and that if it should be found not to be indemnity, bounty it must be. Then surely was the time, when, if at all, the respondents should have gone back to the Court below, after the decision of your Lordships in October, 1831, prepared to meet the second alternative, namely, in case his Honor should be of opinion with the Master, that there was no evidence to show indemnity, for in that case it must be bounty, and then their present contention became material, nay, decisive; in a word, they had a plain course to take when they went back: they were to maintain, first, that the bond was a counter-security and not a gift; but next, if they should fail in showing that, they had to state that it was impeachable in equity on account of the circumstances now urged. That would have rendered it immaterial how the first question was decided, for either way they must prevail. The reference made to the Master, in April, 1827, it must be further observed, was by consent of all parties, nor, indeed, without such consent could the examination, which formed part of the order, have been directed. * Their object apparently was, the * 524 object of all the parties apparently was, to avoid a tedious litigation, and the bringing on at once the investigation of all the circumstances; and the reference expressly gives the Master authority to inquire into the consideration and all the circumstances relative to the bond. Under that order, there was not a single one of the matters now alleged into which the Master might not have inquired, and the respondents could have raised the whole of their present objection. They might afterwards, when they found the Master had reported the bond not to be a counter-security, but a gift, have petitioned the Court and raised their objection, praying to have the circumstances in which the bond was granted further inquired into; if the Court should confirm the Master's report finding it was gift and not indemnity; and contending, that though a gift, it was impeachable. The only objection that could have been made then to such further inquiry, is this, that the respondents might have taken the same ground earlier—I will not say that that objection

might not have been then successful, but that objection applies with ten-fold force now. It is suggested that the appellant may, by a bill being filed against him, be compelled to disclose something within his knowledge relative to the bond, something which he may have heard from his father; this is not very likely, considering that the father has himself been examined very fully; but supposing the appellant to know something material against his own claim, he might have been examined upon interrogatories, had the respondents chosen to take their present objection at the right time. Upon the whole, I can see no reason for a new suit to be now

commenced, in order to give them the opportunity of
 * 525 doing what they had abundant opportunity of * doing before, bringing forward an objection, of the materiality of which they could not at any period of the cause have been ignorant, and to which their attention must needs have been repeatedly called.

Upon the merits of the case, my Lords, supposing that we were now to dispose of the case on the evidence as it stands, and when we consider that the examination of Mr. Nicol is at present in the cause, there can be no doubt that we possess better materials for coming to a decision than we could have in a new suit. It does not appear that any injustice can be done to the respondents, or any favour shown to the transaction in question, inconsistent with principles of the Court of Equity, if this long litigation is here terminated by sustaining the appellant's claim under the bond. It is impossible to compare this with the cases to which it has been likened, of *Huguenin v. Basely*, (a) and *Lord Selsey v. Rhoades*, (b) before the Vice-Chancellor, the present Master of the Rolls. If any credit be given to Mr. Nicol's examination, no one can suppose that there was any ignorance on the part of the obligors touching the nature of the transaction; that they intended a bounty, though a bounty certainly dictated by gratitude for services performed. There was nothing of complexity in the affair; they are proved to have been fully aware of the sum, and to have altered it from 10,000*l.* to 12,000*l.* upon some discussion; that they became liable on

(a) 14 Ves. 278.

(b) 2 Sim. & Stu. 41.

their seal, and from the moment they executed the instrument they must have known of course ; but Mr. Nicol assured them, during their lives, he should keep it inactive, and he did so. The case of *Harris v. Tremenheere*, (a) was in * every way a stronger case of suspicion than this, and * 526 there the transaction, as far as it resembles this case, was supported. I have, in the former stages of the case, stated, that the only circumstance to which any importance can have been attached as against the elder Mr. Nicol's conduct, is, his having employed his own solicitor to prepare the instrument : but as it was a mere common money bond to be filled up, very little turns upon this, and the matter is more in appearance than in reality. It is very possible that the two ladies might not wish their own solicitor to be called in upon a matter requiring no explanation, and very little to be done, even if they had any professional man regularly employed in their affairs, which does not appear to have been the case.

Taking the facts as they are before us, there seems to be every reason to hold that, in Lord ELDON's words, in *Huguenin v. Basely*, the gift was the pure voluntary and well-understood act of their own minds ; nor should we be justified in speculating on possibilities and running after the means of raising suspicions, when all chance of further light being thrown upon the question is at an end, and no new investigation can give us even so much evidence as we now have for our guide. The order, therefore, complained of, as far as it regards the leave given to the respondents, must be reversed, and there must be a direction in your Lordships' order to carry into effect the prayer of the petition of appeal and dissolve the injunction. There must also be a direction as to the computation of interest ; but I will recommend to your Lordships to make no order as to the costs.

Decree below reversed.

(a) 15 Ves. 34.

[435]

MIREHOUSE v. RENNELL.

1833.

THOMAS HENRY MIREHOUSE and WIL-	} <i>Plaintiffs in Error.</i>
LIAM SQUIRE MIREHOUSE	
FRANCES HENRIETTA RENNELL, Widow	} <i>Defendant in Error.</i> ¹
and Administratrix of THOMAS RENNELL, Clerk, deceased	

Advowson. Prebend. Right of Presentation.

Where an advowson attached to a prebend falls vacant, and before filling it up the prebendary dies, the presentation belongs to the administratrix, and not to the successor.

June, 1830. May, 1833.

IN this case the defendant in error (the plaintiff in the original suit) had brought a writ of *quare impedit* against the two plaintiffs in error and the Bishop of Lincoln (the defendants in the original suit), to determine the question of a right to present to the rectory of Welby, in the county of Lincoln. The pleadings stated, that the advowson of Welby belonged of right to the prebendary of the prebend or canonry of South Grantham, in the cathedral church of Salisbury; that Thomas Rennell, clerk, deceased, had been appointed prebendary of South Grantham; in the said cathedral church of Salisbury, and as such had a right to present to the said rectory of Welby; that it became vacant in his lifetime, whereby the right to present vested in him, and that afterwards, and before he had so presented, he died intestate; that letters of administration were granted to the plaintiff, who thereupon became entitled, as such administratrix, to present to the said rectory, but that the said defendants had

¹ S. C., 8 Bing. 490; 1 M. & Scott, 683; 7 Bligh N. S. 241, affirming Pennell v. Lincoln (Bishop), 7 B. & C. 113; 9 D. R. 810, reversing S. C., 3 Bing. 223; 11 Moore, 139.

hindered her, &c. The bishop put in the usual plea of disclaimer, and the other two defendants denied the *right claimed by the plaintiff; averred, that after * 528 the death of the said Thomas Rennell, and while the church of Welby was vacant, the defendant, Thomas Henry Mirehouse, was lawfully instituted prebendary of South Grantham, whereby he became entitled to present a fit person to the vacant rectory, and that he accordingly presented the other defendant, William Squire Mirehouse. The plaintiff demurred to this plea, and the Court of Common Pleas, in Michaelmas term, 1825 (3 Bingham, 223), gave judgment for the defendants. The case was then brought on a writ of error before the Court of King's Bench. The majority of the Judges there (7 Barnewall & Creswell, 113) reversed that judgment, declaring the personal representative of the deceased prebendary entitled for that turn. The case was brought into this House by writ of error from the Court of King's Bench, and was argued in June, 1830, by the *Solicitor-General* (Sir E. SUGDEN) and *Mr. Serjeant D'Oyley*, for the plaintiffs in error, and by *Mr. Patteson* and *Mr. Follett*, for the defendant in error; when the following question was submitted to the Judges: "An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented; does the right of presentation belong to the personal representatives?"

May, 1833.

MR. JUSTICE BOSANQUET. — In offering my humble reasons to your Lordships for answering this question in the affirmative, I propose, with permission, to consider it, — First, with reference to the right of presentation itself, to which the question relates. Secondly, with reference to the person (a prebendary of a cathedral church) to whom the right first accrued. Thirdly, with reference to the deceased prebendary's personal *representatives, whose right is * 529 the immediate subject of the question.

With respect to the first point, I take it to be clear that the patron's right of presentation to an ecclesiastical benefice

is a temporal right. It is expressly said by St. German, in the 36th cap. of the Doctor & Student, that the right of presentation is a temporal thing and a temporal inheritance. It was insisted, however, at your Lordships' bar, that the right of presenting is a personal spiritual trust; and the authority of Bishop Gibson was relied on in support of that position. Bishop Gibson (a) does, indeed, question the propriety of calling it a temporal inheritance, or that it ought, legally speaking, to be considered otherwise than as a spiritual trust. But he refers to no authority in support of his view of the subject. And in the very same chapter in which he suggests this doubt, he says, that the right of nominating, which at first was annexed to the person building or endowing the church, became by degrees appendant to the manor in which it was built; that the right of advowson, though appendant to a manor, castle, &c., may be severed from it, and that, being severed, it becomes an advowson in gross; and he calls the right itself an incorporeal inheritance, which may be granted by deed or will. The grounds on which it has been considered that the advowson or patron's right to present is a temporal, and not a spiritual, inheritance, are well stated by Godolphin (*Repertorium Canonicum*, p. 209), who was, as your Lordships know, an eminent civilian, and King's advocate after the restoration of King Charles the Second. It hath ever been held, he says, that by the common law an advowson is a temporal inheritance, for which he gives the following reasons: that it lieth in tenure, and may

* 530 be holden either of the King or of a common * person; and hath been held of the King *in capite* or in knight's service; that a writ of right of advowson lieth for him who hath an estate in an advowson in fee simple; that a *præcipe quod reddat* lieth for it; that a common recovery may be suffered of it; that an advowson, as other temporal inheritances, may be forfeited by attainder, or lost by usurpation, negligence, and other means there specified; that the wife shall be endowed thereof, and the husband be tenant by the curtesy; that it may be taken in coparcenary; that it may pass, by way of exchange, for other temporal inheritance;

(a) Codex, tit. 83, c. 1.

that by grant of all lands and tenements, an advowson doth pass ; and if not by livery, yet by deed is transferable, as other temporal inheritances, which pass with the manors whereunto they are appendant. It is said that the object of an advowson is of a spiritual nature, since it is to provide a spiritual person to serve the church ; but the right to nominate such person is not the less a temporal estate. That right, according to Fleming, C. J., (a) is an interest, and not an authority. The spiritual interests of the church are provided for by subjecting the fitness of the person nominated to the judgment of the bishop, but the exercise of the patron's right of nomination is not subject to the jurisdiction of any Court but the King's temporal courts. On this point, Godolphin (b) says it is sufficient for the ordinary's discharge, if the presentee be able, by whomsoever he be presented ; which authority is acknowledged on all sides ever to have been inherent in the ecclesiastical jurisdiction. But as to the right of presentation itself, to determine who ought to present and who not, and at what time, and when the church shall be judged to become void and when not ; all these appertain to the King's temporal laws.

* It appears to me, therefore, my Lords, to be indis- * 531
putable, that a right of presentation is temporal property, the alienation of which must be governed by the rules and analogies of the common law ; and that it is no more to be considered in contemplation of law as a trust, than all other temporal property, for the proper use of which the owner is responsible *in foro conscientie*. An advowson being an incorporeal hereditament, may be taken by descent, conveyance, or devise, like other temporal property of that class. It may be limited in fee or in tail, for term of life or for years. If the advowson be held in fee or in tail, it descends to the heir general or special ; if for life, it passes to the remainder-man or reversioner ; all these being freehold interests. A term of years or a single turn goes to the executor or administrator, such interests being less than freehold ; and the whole estate, or a portion of it, or a single turn only, may be sold for a pecuniary consideration. If, indeed, the

(a) Starkie and Poole's Case, 1 Bulstr. 28.

(b) P. 256.

church be vacant, the right of presentation for that turn cannot be granted by a subject, either for value or gratuitously. This restriction, however, is not peculiar to a right of presentation; it applies to annuity or rent actually due, which may be granted before the day of payment, but which cease to be alienable at law after they have accrued; yet the arrears in both cases are unquestionably temporal rights. The nature of the difference which subsists between the right to present on the next turn which may accrue, and the right of presentation to a vacant turn, it is now material to consider. The right to present upon the next turn which shall accrue, is an interest carved out of the fee in the advowson, and if re-conveyed to the owner of the fee, will merge. But the right of presentation to a vacant benefice, though arising from the advowson, is no part of it.

* 532 It has sometimes been called a chattel, sometimes * a *chose in action*, sometimes a fruit fallen. It is called in Dyer, (a) a mere personal thing, a thing in right, power, and authority, a thing in action and in effect, the fruit of an execution of the advowson, and not the advowson. In Co. Litt. (b) it is said to be not merely a *chose in action*, for it survives to the husband, which a bond does not. But by whatever name it may be called, it is treated in law as a right of a distinct nature from the ownership of the advowson itself. In Jenkins (c) it was held by all the Judges of England, that where the next presentation to a church, then void, had been granted, the grant being made by a subject was void, for the present avoidance (it is said) is a thing in action and privity, and vested in the person of the grantor (the patron), and is like a relief or arrear of rent, or an obligation, or a debt. And it is added, if a grantee of an annuity in fee grants an annuity for lives or years, it is good, for this is an estate settled and of continuance; but a grant of the arrears of the annuity is void *causâ qua suprà*, that is, because the subject of the grant is become a *chose in action*. And notwithstanding what is stated in the note to the *Bishop of Lincoln v. Wolforstan*, (d) respecting the fictitious nature of

(a) 233.

(b) 120 a.

(c) 236.

(d) 3 Burr. 1512.

this reason, it appears to me fully warranted both by analogy and authority in point.

No instance can be shown in our books in which a right of presentation to a vacant church has accompanied the ownership of an advowson, in the hands of a subject, if the person to whom the right of presenting accrued, has ceased, either by death or otherwise, to hold the advowson. If a right of presentation accrues to the owner in fee of the advowson, it does not pass to his heir. If the right accrues to a tenant in tail or tenant for life of the advowson, it does not pass to the issue in * tail or the remainder-man; but in all * 533 these cases it goes to the executor, as the representative of the personal rights of the individual to whom it accrued. If the right accrues to a lessee for years of the advowson, and the term expire within six months afterwards, the lessee is entitled to present, notwithstanding the expiration of the term, in preference to the reversioner. Upon what principle can such a claim be sustained but that of a personal right, vested in the individual during the term, distinct from his interest in the advowson? If a *feme covert* be entitled to an advowson, and the church become void during the coverture, and the husband survive, he shall present; but if the avoidance happened before the coverture he shall not present, such right being, as it is said, only a chattel real in action, not reduced into possession during the coverture. And if the avoidance happen during the coverture the husband shall present, though he be not tenant by the curtesy, as in cases where the wife had but a life-estate, or where there has been no issue of the marriage; and in such case, if the husband himself die before presentment, his executor shall present, and not the heir. (a) Can any reason be assigned for this, but that the right which had accrued during the coverture was distinct from the estate in the advowson? The uniformity of the law in all these instances appears to me manifestly to show the general rule to be, that a right to present to a vacant church vests in the individual to whom it accrues as a personal right, which, though accruing from the advowson, is no part of it, is not annexed to

(a) Watson Clerg. Law, c. 9.

it, and does not follow it, when it devolves upon any other person than the individual to whom the right of presentation first accrued.

Two instances, indeed, may be mentioned, in which, though the right of presentation does not pass to the

* 534 *succeeding owner of the advowson, it does not pass to the personal representatives of the deceased individual to whom it first accrued. These are the cases of a bishop and a tenant *in capite* of the Crown, in both of which cases the right belongs to the King. This right of the King, upon the death of a bishop, is sometimes said to arise by reason of his title to the temporalities, and sometimes by reason of his prerogative. But it is equally consistent with either form of expression to say, that it arises by reason of the relation in which a bishop stands to the King. The temporalities of a bishop, of which his advowsons form a part, are held by the King *per baroniam*. The title of the King to seize the temporalities upon the bishop's decease may reasonably be referred to the tenure by which they are held; and the further title to one of the fruits of these temporalities, accrued during the life of the bishop, and vested in him as a chattel at his death, may, consistently with the analogies of the law, be referred to the same source. That the right in question is a condition of the bishop's tenure *per baroniam*, there is great reason to suppose, from the similarity of right which accrues to the King in a case of tenant *in capite* by knight's service. If tenant *in capite* be seised of a manor, with an advowson appendant, and the church become void, and he die, his heir within age, the King shall not only have the wardship, with the right of presenting to such livings as become void during the infancy of the heir, but to any right of presentation which accrued during the life of his tenant. In this respect the case of tenant *in capite* is strictly analogous to that of a bishop. Yet if the land be holden by knight's service of a common person, and not of the King, the executors of the deceased tenant shall present, and not the

* 535 guardian. (a) And if * tenant in socage be seised of an advowson, and the church become void, and he die,

(a) Co. Litt. 90 a. 388 a.

his heir under age, the guardian in socage shall not present, but the executor or administrator. Sir EDWARD COKE, in one place, gives as a reason why the King shall present in the case of a bishop, that the presentation is but a *chose in action*; (90 a) and in another, that nothing shall be taken for the presentation, and therefore it is no assets (388 a). The circumstance of the presentment being a *chose in action*, is a singular ground of objection to its going to the executor; and that of its not being assets would be equally applicable to the cases of a tenant who holds in socage, and to a tenant paravail who holds by knight's service; in both which cases the executor is entitled. How far, indeed, it is quite correct to say that a presentation is not assets, will be seen hereafter. If the right of the King to a presentation accrued before the bishop's death be not a condition of tenure, it may possibly be derived from the same principle which entitles the King to other personal property of the bishop upon his death. It will be recollected that the King is entitled, according to Sir EDWARD COKE, (a) to six things: the bishop's best horse or palfrey, with his furniture; his cloak or gown, and tippet; his cup and cover; his bason and ewer; his gold ring; and, lastly, his *muta canum*, his mew or kennel of hounds, all of which, says the record quoted by Sir EDWARD COKE, "ad dominum Regem, ratione prerogativæ suæ, spectant et pertinent." The origin of the King's right to these chattels is not very clearly ascertained. COKE says, that it was not any mortuary, but was given to the King as a fine, that the bishops might have power to make wills, and grant probates and administrations. BLACKSTONE, on the other hand, (b) thinks, that it was in the nature of a mortuary, which he calls a sort of ecclesiastical heriot, a term which * imports a duty due to a superior, either by * 536 service or custom. Whether it is to be referred to the cause assigned by the one or the other of these learned persons, it is clear that in cases to which the King's right did not extend, the chattels would pass to the executor. To show that the right of presentation is not distinct from the advow-

(a) 2 Inst. 491.

(b) 2 Bl. Com. 245.

son, the following case is relied on by Fitzherbert: (a) "If the King have an advowson in fee which voids, and during the avoidance the King granteth the advowson in fee, the King shall not present to this avoidance." Now, it will be observed, that this proposition turns altogether upon the effect of the King's grant, and that a *chose in action* is grantable by the King, which it is not by a subject. That the proposition is founded on the operation of the King's grant, may in some degree be inferred from what follows, namely: "But if the King have an advowson by reason of the temporalities of a bishop, and during the avoidance the King restore the bishop to the temporalities, yet he (the King) shall present to the advowson, and not the bishop, for this avoidance." In this case the restoration of the temporalities, of which the advowson is part, does not carry with it the presentation, which has fallen while the temporalities were in the King's hand, though it is said in the former part of the passage, that a grant of the advowson would have that effect. A difference, therefore, is taken between a grant of an advowson by the King, and a restoration of the temporalities, including the advowson. Moreover, it must be observed, that Sir MATTHEW HALE, in his Notes on Fitzherbert's *Natura Brevium*, does not implicitly adopt the position in the text, but cites some authorities to show that even the *grant* of an advowson will not carry the presentation, unless there are special words

* 537 of the avoidance in the grant. His note is as * follows:

"*Vide contra*, except there are special words of the avoidance, 16 Hen. 7, 8; Dyer, 282, 302 a, 348 a; and see Accordant, 18 Edw. 3, 58 a; but contrary in the case of a common person, 11 Hen. 4, 54 b; and an avoidance fallen is not grantable by a common person. Dyer, 283, 348; see Stamf. Prerog. 44; 46 Edw. 3, Grants, 50; 18 Edw. 3, 22, &c., in margin." Watson agrees with the suggestion of HALE, for he says: "If when a church is void the King grants a manor, with all advowsons appurtenant, the void turn does not pass thereby unless he also mentions it in his grant." Chap. 10. And another case arising upon a grant of the King is stated, (b) from which the distinct nature of

(a) Fitz. Nat. Brev. 38.

(b) 2 Rol. Abr. 345.

the presentation strongly appears: "If the King has an advowson by reason of a wardship, and he grants to another during the minority of the ward, and after the church becomes void, and continues so until the ward attain his full age, whereby the interest of the grantee determines, yet the grantee shall have the presentation, and not the King." This case is analogous to that of the lessee of an advowson, whose interest having expired, he is entitled to present to a church which had become void during the term. But for the grant, the King would be entitled in preference to the heir; and by virtue of the grant, the grantee is entitled in preference both of the King and the heir.

I will trouble your Lordships with only one more instance, which occurred in the reign of Queen Elizabeth, to show how clearly the right of presenting to a void church was considered as distinct from the advowson itself. If an advowson comes to the Queen for forfeiture by outlawry, and then the church becomes void, and the Queen presents, and then the outlawry is reversed for error, yet the Queen shall enjoy the presentment, * because it came to the Queen as a * 538 profit of the advowson; but if the church be void at the time of the outlawry, and the presentment be forfeited as a chattel principal and distinct, and then the outlawry is reversed, the party shall have restitution of the presentment. *Beverley and Cornwall's Case.* (a) Here the Queen's right to the presentment as a profit of the advowson while in her hands, is asserted in the first part of the case; and the subject's right to restitution of the presentment upon an avoidance before the outlawry is acknowledged in the latter part, because such right of presentment became a distinct chattel before the outlawry.

Secondly: I have next to consider the question with reference to the person, a prebendary of a cathedral church, to whom the right of presentation accrued. A prebendary is a sole corporation existing by charter of foundation, or by prescription, which presumes a charter; and all the possessions of the prebend are derived either from the endowment of the founder or of subsequent benefactors. The right of pre-

(a) Moore, 269.

sentation to a parish church must, therefore, have been derived mediately or immediately from the original patron of the living, who as such was seised of a temporal estate in the advowson. The nature and incidents of that estate could not be changed by its transfer to any particular person or body politic; what the heir of a natural person cannot take, will not go to the successor of a sole corporation; for, as it is said in *Fulwood's Case*, (a) succession in a body politic is inheritance in the case of a body private. And, therefore, in case of a sole corporation or body politic, be it created by charter or prescription, as bishop, parson, vicar, master of an hospital, &c., no chattel, either in action or possession, * 539 shall go in succession, no more than the heir * of a private man can have them; but the executors or administrators of the bishop, parson, &c., shall have them. On this ground it is that a bishop, parson, &c., or any sole corporation, which are bodies politic by prescription, cannot take a recognizance or obligation but only in their private, and not in their public capacity. If, indeed, there be a custom, that the successor of any particular corporation sole, as the Chamberlain of London, shall have a recognizance acknowledged to his predecessor, he shall take it, because the same custom which made him a corporation in succession for the particular purpose has enabled his successor to take recognizances, obligations, &c., made to his predecessor, in the absence of which he would not be entitled to do so. The exception, founded on custom, in *The Chamberlain of London's Case*, establishes the general rule in those cases in which custom cannot be relied on. And, according to Sir E. COKE, in the case of bodies politic by prescription, such as bishops, parsons, &c., in which “&c.” is manifestly included “prebendaries,” there wants such custom to take a chattel, or, as I apprehend, any interest distinct from the inheritance in their politic or corporate capacity. Independently, however, of this negative argument, arising from the incapacity of the successor, I am led to infer from analogy, that the personal right of the prebendary existing at the time when the church becomes void, is to be preferred to that of his successor.

(a) 4 Rep. 64.

The appendancy of an advowson to a manor is analogous to its union with a prebend; yet, if the church is void, and the lord of the manor die leaving the church vacant, his executor and not his heir shall present. The title of a husband in right of his wife, endowed of an advowson by a former husband, is not unlike the seisin of a prebendary in right of his prebend; yet, if the church * become void during the * 540 coverture, and the second husband survive, he, and not the heir of the first husband, shall present; and if the second husband die before exercising his right, his executor would be entitled to stand in his place. The ecclesiastical character of the prebendary does not appear to me to make any material difference between this case and that of any other corporation sole. A prebendary, before the stat. 13 & 14 Car. 2, c. 4, might have been a layman; a prebendary as such has no cure of souls, and was not obliged by the 13 Eliz. c. 12, to subscribe or read the Thirty-nine Articles. (a) Nor would the ecclesiastical character, supposing the prebendary always to have been a priest in holy orders, necessarily entitle his successor to a right of nomination or presenting to a benefice accrued to him in right of his prebend. The transmission of an archbishop's options to his personal representatives, and the right to dispose of them by will, is a strong instance to show that a personal right, though arising from the ecclesiastical character, does not pass to the successor. Another strong instance is that mentioned by Fitzherbert, in his *Natura Brevium*: (b) "If a vicarage happens void, and before the parson presents he is made a bishop, &c., yet he shall present unto this vicarage, because it was a chattel vested in him." In this instance the individual to whom the right accrued as parson, after having vacated the rectory by acceptance of other preferment, is allowed to present the vicar, in preference to the successor in the rectory. Whether the case here put was founded upon any actual decision, or only upon Fitzherbert's own understanding of the law prevailing in his own time, it has the sanction of his great name, and must be deemed of high authority. One distinction, indeed, is recognized between lay and ecclesiastical patrons, in

(a) Burn's Eccles. Law, vol. 2, p. 79.

(b) 34 n.

* 541 respect to the right to vary a clerk presented. * If an ecclesiastical patron once present a clerk, and then vary his presentation by presenting another, the bishop is not bound to receive either ; whereas, if a lay patron having presented one clerk, afterwards present another, the bishop cannot absolutely refuse to institute, but may make his choice ; the ground of which distinction is, that the ecclesiastical patron has not the same excuse as the lay patron for omitting to ascertain the sufficiency of the clerk first presented. (a) But this distinction has no bearing on the question of succession to the right of presentation. It has been urged at your Lordships' bar, that where a judicial officer entitled to appoint to some office, dies without having made an appointment, the successor in the office shall appoint. The first answer to this case is, that such right of appointment is not property of any kind ; and the next, that the same law, whether old or new, which has established the superior office, has regulated the right of appointment ; in which respect the case resembles that of the Chamberlain of London, the principle of which is, that the law which regulates the right of succession, is coeval with the establishment of the office.

It now only remains for me, in the third place, to consider your Lordships' question with reference to the personal representatives of the deceased prebendary. The right of the personal representatives of a natural person, where a right of presenting has accrued, was not disputed in argument. It was admitted to be too firmly established upon authority to be now called in question ; but it was contended to be an exception from the general rule of law, which ought not to be extended to a new case ; the exception itself, though established, being, as it was said, inconvenient and founded on a vicious principle. I do not propose to offer your Lordships any observation upon the convenience

* 542 or inconvenience of the existing * law, by which the personal representative is, in ordinary cases, preferred to the owner of the advowson ; but if the view which I have taken of the right be at all correct, the law which prefers

(a) Kielway, 154.

the personal representative is the general rule, and it lies on those who deny its application to the administrator of a prebendary, to establish a ground of exception. It may be admitted, that the right of such administrators has never been the precise subject of any judicial decision; but little is to be inferred from that circumstance, either on one side or the other. If any argument is to be built upon the absence of litigation upon the subject, I should rather conclude that the general rule has prevailed, than that an exception to it had been admitted without dispute. There can be no doubt that (generally speaking) the executor of a prebendary, as well as every other ecclesiastical corporation sole, takes the personal rights of his testator, whether in possession or in action, which accrued to the deceased in right of his prebend; such as the produce of the prebendal lands actually severed, or rent become due before the death of the prebendary. So a ward, relief, heriot, &c., accruing from the prebendal lands, would pass as chattels to the executor; and, on the other hand, the successor does not take any such rights or interests as are less than freehold. Even if a bond be expressly given to a corporation sole (as the Dean of St. Paul's) and to his successors, the successor shall not sue upon it, but the executor; 20 Edw. 4, 2; Pro. Corporations, 60. It is urged, however, that the right of presentation to a vacant church is not a matter of profit, and that the personal representative of the deceased prebendary ought not to take it, because it would not be assets. But the same argument applies to the personal representatives of a natural person, in which case their title is admitted to be unimpeachable.

If the right of presentation * be not part of the free- * 548 hold, it cannot be exercised by the successor: by whom, then, should it be exercised, but by the person who represents the personal interest of the deceased? The title of a personal representative is not confined to those things which become assets in his hands. All the personal estate of the deceased, whether held for his own benefit or for that of others, passes to his executor or administrator. Terms for years producing no benefit, covenants and obligations for the benefit of strangers, vest in the personal representative. If

the patron be disturbed in presenting to a vacant church, and die, his executor, and not his heir, must bring the writ of *quare impedit*. It can scarcely be argued, that the successor of a deceased prebendary, who was disturbed in his lifetime, could maintain such a writ: and if not, who but the executor could maintain it? And who is to have the writ to the bishop? Moreover, it is to be recollected, that in such an action damages are recoverable, and that such damages would be assets. In *Smallwood v. The Bishop of Coventry*, (a) it was expressly held by the Justices, that this action was within the equity of the statute of the 4th Ed. 3; for the presentation is a chattel that should go to the executors if the disturbance had not been, and for a disturbance in their own time they shall recover damages to the use of the testator; by the same reason, for a disturbance in the time of their testator, they shall recover damages by the equity of the Statute 4 Ed. 3; and according to the report of the same case in Saville, 118, it was held, with reference to the objection that the presentment could not be assets, that every thing which the law gives to executors should be said to be valuable assets; that by recovery in *quare im-*

* 544 *pedit*, the damages would be assets; * and so, as the advowson is assets in the hands of the heir, the presentment shall be in the hands of the executor. Will it be said, that such assets belong to the successor of a prebendary, or that he, rather than the executor, is to sue for them for the benefit of the deceased's personal estate? It has been objected, in argument against the right of the personal representative, that he cannot present in right of the prebend, yet that he ought to present in that right in which the deceased prebendary must have presented. But the same difficulty, if it be one, would apply to the case of a husband, who, though not tenant by the curtesy, presents after his wife's death, in respect of an advowson vested in the wife, to a living becoming vacant during the coverture; and also, to the case mentioned by Fitzherbert, of a parson to whom a right of presenting to a vicarage has accrued in right of his church, and who presents a vicar after having vacated his rectory by

(a) Cro. Eliz. 207.

promotion. In both these cases, the title, which accrued *aleno jure*, is asserted by the presenter as a personal right vested in the individual to whom it accrued. The observations which I have humbly submitted to your Lordships have been confined to the case of a presentative advowson, the object of your Lordships' question being in terms a right of presentation. The case of a donative advowson, in which there is no presentation to the bishop, stands altogether upon different ground, not forming, as I conceive, any exception to the general rule which has been mentioned, but being of a nature to which the rule is inapplicable. The principle of the rule which carries the right of presenting to the executor, is, that the right which accrued to the testator as patron is become distinct from the advowson. It belongs to the patron for a limited time only, which time is independent of his interest in the advowson. If not exercised within six months, it passes as a separate and distinct * interest * 545 to the bishop; and if not exercised by the bishop within six months more, it passes in like manner to the King; neither the bishop nor the King having any interest in the advowson. In the case of a donative, the right of presenting is subject to no limitation. Though the patron forbear to fill the church for any length of time, his right is not lost; it does not pass from him to the bishop, nor to the King, nor to any other person: and if he never fill the church at all, the common law has made no regular provision for compelling him to do so. So different is the right of the patron of a donative from that of a presentative advowson, that even during the incumbency, the sole right of visitation and correction continues in the patron, independent of the jurisdiction of the ordinary. The patron alone can deprive the incumbent, and it is to him that resignation must be made. It is necessary here to consider, whether by the spiritual Court, or by any means, the owner of a donative might be obliged to supply a minister for the service of the church, upon the ground of his having dedicated the church to the public for spiritual purposes; for admitting such obligation to lie upon the patron, yet during the vacancy of a donative, either by death, resignation, or otherwise, the freehold of the

church, of the glebe, and of the tithes, reverts to the patron, and remains in him till by a new gift he confers it on a new incumbent; and it would therefore be inconsistent with this title of the patron, that any other person should have a right to divest his freehold by collation. For these reasons, my Lords, I am humbly of opinion, that where an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation belongs to his personal representative. .

* 546 * MR. JUSTICE JAMES PARKE. — To the question which your Lordships have been pleased to refer to the Judges, I answer, that, in my opinion, the right of presentation belongs to the personal representatives of the deceased prebendary. The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them of any of our Judges, or of those ancient text writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science. I propose, therefore, to inquire, by reference to those

sources from which we usually derive them, what the rules and maxims of the common law upon this subject are ; and it will be found that there is little difficulty in the inquiry, and none, as it seems to me, in their application to the facts under consideration. * The decision of the pres- * 547 ent case depends upon two propositions, both of which appear to me to be established by authority, and neither of which can be shown to be unreasonable or inconvenient. First, that in every presentative benefice, the void turn is a personal right or interest, which is disannexed from the estate in the advowson, and vested in the person of the individual to whom the advowson then belongs. Secondly, that whether valuable in a pecuniary point of view or not, all personal rights and interests of the nature of property, and which are not extinguished by death (with some exceptions, which are easily explained, and which have no bearing upon the present case), vest, on the death of the owner, in his personal representatives.

The first of these two propositions, I say, will be found to be supported by authority ; for in every case which is reported, and in every book in which the subject has been treated of or mentioned, as far as I have been able to discover, the void turn or right of presenting to a vacant presentative benefice is either expressly stated to be a personal right or interest, under a considerable variety of description, or the cases mentioned are capable of a satisfactory explanation upon that supposition only. It is true, that the great majority of the authorities to which I refer relate to benefices in lay hands, but all do not ; and there is no one case, text-book, or *dictum*, of which I am aware, in which any intimation is conveyed that there is any exception to this general rule. Surely it is impossible to argue, with such a constant, uniform, and unvarying course of precedent on one side, in all cases in which the subject has been in question, and in the absence of all authority for such an anomaly on the other, that the case of an advowson in spiritual hands is an exception to the general rule ; and if the absence of authority * were not sufficient, it seems impossible to show in * 548 what way the exception could have arisen.

I have said that this rule exists in all presentative benefices, and I confine it to these; for donatives are a very different species of property, and are governed by different rules. This subject is most clearly explained, and all the authorities referred to, in the very learned judgment of my brother LITTLEDALE, in the Court below (7 Barn. & Cres. 145); and it is enough to say the result is, that in donatives the complete dominion over the vacant benefice, and the freehold in it, remain in the patron, together with the right to take the intermediate profits, until it is again granted out by him to a new incumbent, in the nature of a new investiture. This freehold, in the case of the death of the patron during a vacancy, of course passes to the heir. I do not propose to occupy your Lordships' time by citing all the authorities to prove that the void turn of a presentative benefice is a personal right or interest. They have been all referred to in the arguments at your Lordships' bar, and in those in the Court below. In some cases this interest is called a "*chose in action*," *Leach v. Babbington*; (a) in some "a chattel," as by PERIAM, Justice, in *The Queen's, Fane's*, and the *Archbishop of Canterbury's Cases*; (b) in others, as in *Fitz. Nat. Brev. Quare Impedit*, 34 N., and 3 Keble, 152, "a chattel vested." A "personal chattel," *Vin. Abr. Executor*, z. 2, pl. 4, note. "A chattel vested and severed from the manor," *Fitz. Nat. Brev.* 33 P. In one it is called a "personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy;" also "a thing in right, * 549 power, and authority;" and also, "a *chose * in action*, and in effect, the fruit and execution of the advowson, and not any advowson," by six Justices, in *Stephens v. Wall*; (c) in 3 Leon. 256, "a power to present, and an authority annexed to the person." In *Digby v. Fitch*, (d) Justice WARBURTON said, "the presentment is the possession, in *quare impedit*; as in rent, the reserving; in common, the "taking of the profits." In *Brooksby v. Wicham*, (e) it is also compared to rent, and this analogy will be found to be the

(a) Cro. Eliz. 811.

(b) 4 Leon. 109.

(c) Dyer, 283, a.

(d) Bro. & Golds. 167.

(e) 1 Leon. 167.

most perfect. The advowson is the estate, which descends, may be conveyed, is limited, and escheats as such; the presentation is the mode of enjoyment, the profit or rent of the estate, and, like the rent or profit, belongs to the owner of the estate at the time; it accrues in the nature of a personal chattel, distinct and severed from the inheritance; it belongs to him not as owner, but as an individual.

These authorities, in which the right of presenting on a void turn is treated as a personal right, are not confined to the case of passing to the executor, in the event of the patron's death during vacancy. There are many others in which it is so treated. A termor in the advowson has a right to present, though after the term has expired, to a vacancy which happened during the term, *Fitz. Nat. Brev. Quare Impedit*, 33 a; *Brooke, Presentation Eglise*, 22; and he would be equally entitled to the rents in arrear of an estate granted for the same term. A husband is entitled to present after his wife's death, on an avoidance during his wife's lifetime, of a church of which she had the advowson, *Co. Litt.* 120 a; *Brooke, Present. à l'Eglise*, pl. 22; as he would also be entitled to the arrears of rent of his wife's estate. It is incapable of being assigned (*Dyer*, 283 a) * or released by one joint tenant to another * 550 (1 *Leon.* 167), as arrearages of rent are. If the patron be outlawed in trespass, the church being void, the King is entitled, as to the other goods and chattels of the outlaw, and as he would be to the rents of his lands. *Brooke, Presentation à l'Eglise*, 22; *Fitz. N. B.* 34 Q. All these are cases of advowsons in lay hands; but a void turn is treated in one case as a personal right, disannexed from the advowson when in spiritual hands. In *Fitz. N. B.* 34 N., it is said, that "if a vicarage happen void, and before the parson present he is made a bishop, &c., yet he shall present unto this vicarage, for it was a chattel vested in him." All the authorities which I have cited are uniform (and many others might be adduced) to show that the right of presentation is a personal right disconnected from the estate of the advowson, and belongs to the person of the owner; and the last applies to the case of a spiritual person, and is in point. But, on the

part of the successor, it is argued, so far as his case is put upon the ground of authority, that the last case is single and unsupported, and that all the others are anomalies; that in truth the general rule is, that the void turn continues part of the advowson; that these exceptions have been introduced in all cases of lay patronage, without any reason at all, though they have been too firmly established by authority to be now disturbed, but that the general rule still continues, and ought to be maintained in the case of spiritual advowsons. Of course the burden of proving the existence of this rule lies on those who assert it; but the singularity of this argument, which was urged at your Lordships' bar, is, that while it treats all the cases in the reports and books as anomalies and exceptions to a supposed general rule, without the least authority for stating that they are exceptions and ano-

* 551 malies, it asserts * the general rule, as will be found, without any authority for it; for there is no one case or *dictum* cited which makes any mention of such a general rule. But it is contended that it must be implied that there is such a rule, from four cases which lead to the inference that the next turn continues part of the advowson: one was where the incumbent was also patron, and died seised in fee of the advowson; the heir was held entitled to present, and it was said that this must be because the turn continued a part of the advowson. *Hall v. The Bishop of Winton*; (a) but this case was decided not on the ground of the next turn continuing parcel of the advowson, but expressly on the ground that the descent to the heir and the fall of the avoidance to the executor happened in one instant, and that the elder right should be preferred. The general nature of the interest which arises on an avoidance was distinctly admitted, and the right of the heir put upon a ground which is perfectly consistent with it. Two other cases from which this inference was raised, were those referred to in Co. Litt. 388 a. A bishop dies, a church being vacant in his life, and after his decease the King shall present, and not the executor or administrator: so also in the case of the death of a tenant by knight-service *in capite*, with an advowson appendant, which

(a) 3 Lev. 47.

has become void in his life, his heir within age, the King presents, and not the executor or administrator. And this is said to be another proof that the void turn is still a part of the advowson. But though the King omit to present till he restore to the bishop his temporalities, or till the heir be of age and sue his livery and hath it, the King still has the right to present; and this shows that in neither case the void

* turn remains parcel of the advowson, and belongs to * 552 the person who is owner of it. For both these positions, Fitz. N. B. 33 N. O., is an authority. Besides, it is said in Co. Litt. 388 a, that if the land be holden of a common person, in that case the executor shall present; but if the void turn were still part of the advowson, why should not a common person as well as the King, when both take the advowson, exercise this right? It is quite clear, therefore, that as neither of these cases can be explained by the supposed rule, we must look for another explanation. Both are clearly referable to the King's prerogative, which entitles him in these special cases to this personal interest. It should be observed, also, that Rolle's Abr. Presentation à l'Eglise, c. pl. 4, and Bro. Present. à l'Eglise, 10, which state that the King is entitled, both state that the bishop's executors are not; which shows that these great lawyers thought the void turn was disannexed, and that the successor at all events had no right whatever. A fourth case, from which the inference of this continuance of the void turn as part of the advowson, was deduced, was that of a conveyance by the Crown of an advowson, whilst the church was void, which, according to Fitz. N. B. 33, n., passes the void turn. Admitting that authority to be correct, and it is doubtful from what is said upon this subject in Dyer, 347 b, it is a question only as to the effect of the King's grant, and never could have arisen unless the void turn had been severed and distinct from the advowson. The case, in truth, amounts to no more than this, that the grant of an advowson which involves in it every present and future right of presentation, passes, in the case of the Crown, the next presentation to a void living, which the Crown can grant; Dyer, 283 a; though in the case of a subject it would not; for a subject cannot grant over such a

* 553 *personal right. None of those four casés, therefore, which are relied upon as proofs of the existence of this supposed rule (and there are no others), in reality prove it at all, and all are capable of being satisfactorily explained upon another supposition. There is, therefore, as it appears to me, a great body of authority in favour of the position that the void turn is a personal right in all cases; and when the cases are investigated, a total absence of authority to the contrary. If it be conceded that this interest is of a personal nature, and dissevered from the advowson in all cases, it must be contended that in the case of a spiritual person, this personal interest or chattel will go by succession. But that is a violation of the established rule that a corporation sole cannot take a chattel by succession, whether in possession or action. *Fulwood's Case*; (a) and no authority can be cited to show that this special chattel interest is an exception. I have shown, therefore, that there is no authority for the alleged general rule that the void turn continues annexed to the advowson, and is not of a personal nature; and if it be of a personal nature, there is not only no authority, but it is against the rules of law that it should pass to a successor. Upon the hypothesis in favour of the successor, all the decided cases are anomalies; upon that made by the personal representatives, that the right of presenting is in all cases, both of lay and spiritual patronage, a personal interest, we have an uniform and consistent system. As this right when in lay hands is analogous to rent, in the case of land, so it is when the advowson is in spiritual hands; and as a parson or prebendary, who resigns, or his executor, when he dies, is clearly entitled to the arrearages of rent and profits

* 554 which accrued before his resignation or * death (Fitz. N. B. 122 D.; 120 L.; 19 Hen. 6, 44); so he or his personal representative ought to be entitled to the right of presenting, which fell during the same period. Besides, if this anomalous principle is introduced on the ground of the spiritual character of the prebendary, what is to be said of it while the prebend was in lay hands, which it clearly might have been before the Act of Uniformity, according to the

(a) 4 Coke, 64.

case of *Bland v. Madox*? (a) Is the void turn to be dissevered or not, according as the prebendary is a layman or ecclesiastic? It is said that this patronage is so annexed to this spiritual corporation as to be incapable of separation from it; but not only is there no authority for this position, but many precedents are against it, in which bishops and other ecclesiastical corporations sole have granted away their right to laymen, which grants have been considered good against themselves. I need not refer your Lordships to the authorities; they are collected in the reported cases in the Courts below. And, indeed, I am at a loss to see in what way the alleged difference, if there be any, between the qualities of an advowson in lay hands and in those of a spiritual proprietor, could have arisen. It is highly probable, to say the least of it, that all rectories were originally created in the hands of laymen, who received the patronage from the bishops in lieu of those lands which they granted on the foundation or endowment of a church; and if this be so, what is there to raise the presumption that when they afterwards granted these advowsons to the church, they wished them to have new properties and qualities different from those they had in their own hands? or, if they did wish it, what power had they to communicate them? They could no more alter the rules of law, * and make chattel interests be taken in * 555 succession by a corporation sole, than they could make the estate in a freehold descend to executors. "Succession in a body politic is inheritance in a body private:" *Fulwood's Case*; (b) and no grantor can, however much he may wish it, limit his estate against the rules of law. And supposing that there were instances in which a bishop or other ecclesiastical person, and not a layman, had originally founded or endowed a church out of the lands belonging to him in that character, and became the proprietor of the advowson which he or his successor had granted to the prebendary, the same difficulty occurs in proving the intention of the donor, and a similar difficulty in carrying that intention into effect; and if those difficulties are overcome, the alleged difference in the quality of lay and spiritual advowsons must at all events

(a) Cro. Eliz. 79.

(b) 4 Coke, 64.

be confined to those very special cases, exclusive of all others.

The next proposition which the authorities establish, is, that all personal rights and interests of the nature of property, and which are not extinguished by death, vest on the decease of the owner (with some few exceptions), in his personal representatives. The executors or administrators are not constituted for the purpose of paying the debts of the deceased; their liability to those debts is a consequence of their representative character. Litt. § 337, says that executors represent the person of their testator; so Yelverton, 103, is to the same purpose. He is in law the testator's assignee. Wentworth Off. Ex. 100. As to the estate committed to his trust, he may charge others and be charged himself, sue and be sued, as the testator himself ought. Sheppard's Touch.

401. Executors take therefore all the personal estate * 556 and * interest of the testator, and are identified with him in respect to all personal property, but their obligation to pay debts is only to the extent of the value of those effects which are valuable. They have all the deceased's effects, but they are liable only for assets. It is a fallacy to suppose that they take nothing but what is valuable; and therefore do not take rights of presentation to void benefices; a fallacy which has led to the argument that all the cases in which a personal representative has taken a void turn, which certainly cannot be sold, are unreasonable anomalies. The 31 Ed. 3, st. 1, c. 11, puts administrators who are the deputies of the ordinary on the same footing as executors. (a) To this rule, that the personal representatives take all the personal rights of the deceased, of the nature of property, there are some exceptions, which the common law, in the case of private individuals or the King's prerogative right, has established. Chattels touching the realty, deer in a park, fish in a pond, evidences of heir-looms which go to the real representative, and the analogous case of the ornaments of a bishop's chapel, which pass to the successor, are of the former description; the right of the Crown to the void turn, in the case of the tenant *in capite*, and the bishop, stated by COKE, (a) *Vide* also Shep. Touch. 401.

p. 388 a, are instances of the latter; and it is to be observed, that both those instances are put by him as exceptions to the general rule, that chattels, as well real as personal, shall go to the executors or administrators. None of the excepted cases have any bearing on this, and there is no mention anywhere made of an exception of the right in question when in spiritual hands; and it would violate the rule of law, as to succession by a corporation sole to chattels, if it did.

* My Lords, I must own that it appears to me to be * 557 quite clear, that if this case is to be decided, as I conceive all similar cases ought to be, according to the rules deduced from former decisions and legal precedents and principles, there is no doubt as to the right of the personal representative of the prebendary to present to the void living. These rules cannot be shown to be contrary to sound reason and just policy. We are not inquiring whether other rules might or might not have been more wise or reasonable, and whether the heir in the case of lay property, and the successor in that of spiritual property, might or might not have been likely to exercise the right of presentation more beneficially to the public interests. If such an alteration is proper, and it is not my province to inquire whether it is, it must be made by the legislature. "What ground has a Judge," says Lord Keeper HENLEY, "to alter the law because he cannot approve the reasons that others have given, or may not be able to assign a satisfactory one himself?" At present the system is at all events uniform and consistent, and uniformity and consistency ought not to be lightly sacrificed. The law of England, which has from the first treated advowsons as property (the founders or benefactors of churches having had the patronage granted to them as property for a valuable consideration), has not relied upon the person or character of the patron for the due exercise of the trust, but has adopted other securities for that important purpose. The incorrupt exercise of the trust is secured by the penalties against simony, and the selection of a fit clerk by the examination of the ordinary. Subject to these provisions, it has left the patronage of churches to descend, be limited, and enjoyed, like other real property. For these reasons, I am of opinion that

- * 558 * the right to present to the void turn passed to the personal representative of the deceased prebendary.

MR. JUSTICE GASELEE. — This, my Lords, is not the first occasion on which my attention has been called to this question. The case has been since very fully and ably argued at your Lordships' bar; and in the course of the several discussions which it has undergone, I believe every authority that can be brought to bear upon the subject has been cited, and they are all mentioned in the reports of the former discussions: (a) I shall therefore not trouble your Lordships with going through them at length, but shall state, as shortly as I can, the grounds upon which I found my answer to your Lordships' question in the affirmative. It is extraordinary that although cases similar to the present must have happened, there are no traces of any such having been made the subject of legal investigation; nor, upon the best inquiry I can make, have I been able to ascertain what the practice in such cases has been. It is admitted that the general rule with respect to presentative livings is, that if after a vacancy the patron of the advowson dies without having presented, the rights of presentation to the vacant turn belong to the personal representative, and not to the heir of the patron: and the reason given in the books for this is, that it is a fruit fallen, a chattel severed from the inheritance; or, in other words, that the moment a church becomes vacant, the turn is separated and disannexed from the advowson, and is vested in the person of the individual to whom the advowson at that instant belongs. See 4 Leon. 109; Fitz. N. B.

33 P. 34 B. and 34 N. P., and many other authorities.

- * 559 And it is so far considered * as disannexed from the inheritance, that the grant of an advowson during the vacancy does not carry the vacant turn. Where the husband is tenant by the curtesy, and the church becomes void during his life, and he dies before it is filled up, yet the heir of the wife, who takes the advowson, shall not have the vacant turn, but the husband's executors. So where the wife is seised of the advowson, and the church being void, dies with-

(a) 8 Bing. 228; 11 B. Moore, 139; 7 B. & C. 113.

out having had issue, so that the husband is not a tenant by the curtesy, yet the husband shall present to the vacant turn, and not the heir of the wife. Again, in the case of a termor, if a vacancy happens, during the term, and he does not fill it up during the continuance of the term, he is entitled to do so after the expiration. And there are many cases which decide that although the grant of the next presentation be made to a man and his heirs, yet it shall go to his executors, and not the heir.

But it is said there are exceptions to this general rule ; one of which is, that where the patron is the incumbent, the vacancy occasioned by his death shall not be filled by his executors, but by his heir, upon whom the advowson descends ; and for this is cited the case of *Hall v. The Bishop of Winchester*. (a) But what is the reason given by the Court for this ? It is, that all is done in an instant, the descent to the heir and the falling of the advowson to the executor ; and that where two titles accrue in the same instant, the elder shall be preferred ; as in the case of joint tenancy, where one devises his part, the titles of the devisee and of the survivor happen in the same instant, and the title of the survivor, being the elder, shall be preferred.

Another exception is, where the patron is a bishop, and entitled to the living in right of his see ; in that * case, if the bishop dies after the vacancy, and before * 560 it is filled up, the King, and not the executors of the bishop, shall present. Various reasons are given in the books for this ; one is said to be, for that nothing can be taken for the presentation, and therefore it is not assets. This merely cannot be the reason ; for if it were, it would apply to every case, and entirely do away with what is admitted to be the general rule in presentative livings.

Another reason given is, that it is a spiritual trust, and consequently, in the vacancy of the see, vested in the King as supreme patron and head of the church. Is this the reason ? The vacant turn is by all the authorities considered as part of the temporalities of the see. The King takes it as such ; it passes to a third person by the grant of the temporalities ; and

(a) 3 Lev. 47.

nothing can be more strong to show that it is considered as disannexed from the advowson, than that if the vacancy remains unfilled, not only until after the consecration of the new bishop, but after restitution of the temporalities, the vacancy is still to be supplied by the King or his grantee, and not by the new bishop, to whom, if not considered as so disannexed, it would naturally pass as part of the advowson. The rights of the Crown upon these subjects are stated in Watson's Complete Incumbent, c. 9, 48. If the rule be that all ecclesiastical patronage is a spiritual trust, and cannot be transferred into lay hands, what becomes of the case of an archbishop's options, which are to all purposes considered as chattels, and his personal property? He may devise them, and if he does not, they pass to his personal representative.

It is true, that after the vacancy happens the option cannot be sold; and although it cannot be supposed that any archbishop would sell it during his lifetime, yet there
 * 561 * may be cases in which his executors or administrators might be compelled to do so before a vacancy happens; as, for instance, on the application of a residuary legatee, or one of the next of kin. A distinction is attempted to be made between ecclesiastical and lay patronage, because it is said that in the latter the church is secured from an improper person being presented, by the bishop's right to refuse the party presented. But there is, in fact, no ground for this distinction. In this very case the administratrix claims only to present; the Bishop of Lincoln is to judge of the fitness of the person presented. And so it is in all presentative livings, whether of ecclesiastical or lay patronage; the bishop of the diocese in which the benefice is situated, is to examine and decide upon the fitness of the presentee. I am not aware of any authority which has determined that a grant by an ecclesiastical patron of a presentative living, to which he was entitled in respect of his ecclesiastical preferment, is void, although of course he cannot grant it beyond his own life. In Watson, p. 53, it is said to have been held, that a grant by a bishop of an archdeaconry for twenty-one years, though void against the successors and the King, is good as against himself. And many of such grants in ancient times are to be

found in the Books of Entries. I will not trespass upon your Lordships' time by stating them at length, but merely refer to the books where they are to be found: *The King v. Abbott and another*, Vet. Intr. 110; *Stanhope v. The Bishop of London and others*, Hob. 237, Winch's Entries, 825; *Webster v. The Archbishop of York and Woodroffe*, Co. Entr. 507; *Hill v. The Bishop of London and others*, Co. Entr. 508; *Adamson v. The Bishop of Lincoln and others*, 2 Bro. Entr. 233; *J. N. v. The Bishop of Bath and Wells*, Rastall, 522; *Overton v. Syddal*, Co. Entr. 122; *Byng v. The Bishop * of Lincoln*, Winch, 858. Although there do not ap- * 562

pear to have been any decisions in these cases, yet Mr. Justice ASHURST, in *Radcliffe v. Doyley*, 2 Term Rep. 636, says that "the forms of legal proceedings are evidence of what the law says." In one case indeed, that of *London v. Southwell*, reported in Hob. 303, the pleadings of which are in Winch's Entries, 810, it was held that an advowson did not pass by a lease made by a prebendary, not because the grant of an advowson by a spiritual person was illegal, which if the law were so would have been an answer to the case, but because the words of the lease were not sufficient to comprise it. And in the case of *Armiger v. Bishop of Norwich and Holland*, the Court said that the grant by a bishop of an advowson, though void under 1 Eliz. c. 19, against the successor and the Queen, was good against the bishop whilst he continued to hold the see. And in *Poyner v. Chorleton (a)*, it appears that the grantee of a dean and chapter of the next avoidance, may recover in *quare impedit*. Much stress has been laid by the counsel for the plaintiff in error, on the case of *Repington v. The Governors of Tamworth School*, (b) in which it was held, that in the case of a donative the right of donation descends to the heir, and that the executor has no title, which the Court said he would have had if it had been a presentative living. This case is so very miserably and scantily reported that it is impossible to ascertain the grounds of the decision. It does not militate against the general rule which I have stated in the early part of what I have addressed to your Lordships; and which, as I have above stated, the

(a) Dyer, 135, a.

(b) 2 Wils. 150.

Court, in giving their judgments in the case of *Repington v.*

The Governors of Tamworth School, said, would have
 * 563 governed that * case if it had been one of presentative
 livings. It is said in a case subsequently reported,
 that "judgment was overruled in Easter, 1763, by reason of a
 mistake in records."

Another ground of objection taken to the plaintiff's claim
 is, that admitting the vacant turn to be a chattel, still the
 plaintiff is not entitled to present, because it is said that the
 prebendary is a sole corporation, and that a sole corporation
 cannot take a chattel by succession, except in the case of the
 King. That a sole corporation, except in the case of the
 King, cannot take a chattel in succession, is true; but what
 appears to be the fallacy of the argument in this part of the
 case is, that the prebendary did not take the void turn by
 succession; the advowson goes to the next prebendary by
 succession, and if the void turn went with it, it must be as a
 part of the advowson; for if disannexed from it, and a
 chattel, as it is stated by the authorities, he could not take it.
 It appears to me, however, that the moment the vacancy
 happens it becomes a chattel vested in the then prebendary,
 in his individual capacity, and passes to his representatives in
 the same manner as rent or any other fruit of the prebend,
 which has accrued or fallen during his lifetime; and for this
 I would refer to the case cited in Mr. Justice HOLROYD's
 judgment from Co. Litt. 99, and to the passage in Fitz. N. B.
 34 N., that if a vicarage happen to be void, and before the
 parson presents he shall be made a bishop, yet he shall pre-
 sent to the vicarage, because it was a chattel vested in him.
 With respect to any observation that arises from the form of
 the present claim of the last incumbent, which is set out in
 3 Bingham, 279, supposing your Lordships can take notice of
 it, which I apprehend your Lordships cannot, framed as the
 record in this case is, in which the patron states him-
 * 564 self to be prebendary of * the prebend of South Gran-
 tham, anciently founded in the cathedral church of
 Sarum, and in right of that prebend the true and undoubted
 patron of the rectory of Welby, in the county of Lincoln, in
 the diocese of Lincoln; I am not aware of any determination

that the common form, which is to be found in 1 Burn's Ecclesiastical Law, 150, would not be sufficient. That form runs thus: "I, Sir W. B. P., true and undoubted patron of the rectory of the parish church in the county of — and in your diocese of — now vacant by the death of A. B., the last incumbent thereof." But if that form be necessary where the presentation is made by the prebendary himself, it does not follow that, because the administratrix cannot use that precise form, she cannot present at all. In the common case the executor or administrator cannot use the precise form used by the patron; it must of course be adapted to the particular situation of the party. In considering the answer I shall give to your Lordships' question, I have confined myself to the matters contained in this record. Of the several documents stated in the judgment of the noble Lord who was Chief Justice of the Court of Common Pleas when the case was determined in that Court, we have no judicial notice; they were not, they could not have been given in; because upon this record nothing decisive can be drawn from the general history of the foundation of prebendal churches, or the appropriations of livings to them. There does not appear to have been any general mode of appropriation; they are stated to have been made to the body, or to some one particular member of it. Of what was the course pursued in the case before us we have no judicial notice, nor any evidence, either judicially or otherwise, respecting the will of the founder. Under these circumstances, therefore, in a case admitted to be of the *first impression, * 565 and upon which no precise authority can be found, it seems to me that the safest course is to follow the general rule applicable to presentative benefices.

My humble answer to your Lordships' question is, that the right of presentation belongs to the personal representative.

MR. JUSTICE PARK. — When the case, out of which the question propounded by your Lordships for the opinion of his Majesty's Judges, first came before the Court of Common Pleas, I took infinite pains, by reading much in ecclesiastical history, by consulting our text writers, to satisfy my

mind upon it (for as to decided cases, there are none); and after that, after having two very elaborate arguments at the bar, and long consultations with the then Lord Chief Justice of the Common Pleas, I came to the conclusion that Mrs. Rennell, as administratrix of her deceased husband, was not entitled to that which she claimed; and in giving which opinion, I am happy to say, I concurred with Lord Chief Justice BEST (now one of your Lordships' House), and Mr. Justice BURROUGH, a man who for legal knowledge, and sound and correct understanding, was of no ordinary kind. To err in judgment with two such Judges, if err we did, can be no disgrace to any man. When this case was removed from the Common Pleas into the King's Bench, by writ of error, three of the learned Judges of that Court reversed the judgment of the Court below, against the opinion of Lord TENTERDEN, the Chief Justice; so here again the Judges were three to one against the judgment: thus four Judges were opposed to four; and, therefore, we need not wonder that this case has found its way into your Lordships' House.

I have again heard this case argued with great learning and ability at this bar; I have considered every argument, and studied the judgments of my different learned brethren, and the authorities they have quoted; and though I do not deny that my mind has now and then fluctuated (which great learning and great ingenuity at the bar will frequently occasion), I have arrived at the same conclusion I did in the Common Pleas; namely, that the administratrix of Mr. Rennell is not entitled to the presentation to the church in question, the advowson of which belonged to Mr. Rennell, as prebendary, in right of his prebend in the church of Salisbury; and that is the answer I propose to give to your Lordships' question. Before I enter into the argument, which must be almost a repetition of what I formerly delivered, and which is now in print, I hope I may be allowed to assert, that had any thing passed, either in the Court of King's Bench or in this House, which had convinced my understanding that my former opinion was erroneous, I should be one of the first to acknowledge my mistake, and to retract my judgment. I have done so on two other occasions

in this House, and shall never be ashamed to make such an avowal; for none but a weak, nay a wicked mind, will persist in error, if the understanding and more mature reflection convince a man that he had before formed a wrong judgment. It is admitted, then, that it is not necessary for your Lordships to decide, upon this record, who has the right of presentation to the living in question; the point is, whether Mrs. Rennell, as administratrix to her deceased husband (which must be in his natural capacity), has established her claim to a living, the advowson of which belonged to her deceased husband, in right of his prebend of South Grantham. Not that upon that question I have not a clear opinion; for I do not think it goes to the Crown, as it was surmised it did, but I think it goes to his successor in the stall or

* prebend in the church of Salisbury. A point has been * 567 much insisted and argued upon, which seems to me to be the foundation of all the misconception in this case, but it is a point upon which there is no difference of opinion; namely, that in the case of lay patronage, in the events which have happened, the patron dying after the actual vacancy, the personal representative and not the heir would have been entitled to the presentation; because in merely lay patronage, the church, having become vacant in the lifetime of the last possessor, thereby became a chattel, and went to the executor as personal property, being severed, and therefore no longer remained with the advowson as a part of the possessions of the heir of the person seized of the advowson; and in that case it is a mere question between the different representatives of the same patron. Of this law there is now no doubt, grounded upon the authority of decisions and of a practice long known; although I own I cannot state or discover any reason very satisfactory to myself for deciding that the void turn in the lifetime of the patron is a mere chattel, when the question arises between the heir and the executor of a natural person. For Lord COKE, in his first Instit. 388 a, says that such a turn is not assets, and therefore nothing can be made of it for the payment of debts; therefore the rule between heir and executor cannot depend upon considerations of that sort. But I agree with Lord TENTERDEN that the want of a

satisfactory reason is not a sufficient ground for overturning a practice long established. This, however, in my way of considering this case, leaves the point still open; and I cannot find from any of my learned brethren in any Court, who have judicially given any opinion, nor from any industry displayed at the bar in the Courts below or in this House, nor

from my own laborious reading and research upon this * 568 subject, that in * any Court in England has such a case *in specie* ever been decided. The question is, in my view, whether lay and spiritual patronage are not to be considered as standing upon a very different footing. That facts similar to those which have occurred in this case must have existed many hundred times, no man can doubt; and that ecclesiastical patrons thought it clear one way or other, must be the reason why no decision upon such a point is to be found in our books. I myself verily believe that till this claim was set up, no spiritual person ever imagined that those rights which a man held *jure ecclesiæ* merely, could be exercised by others after his death; the words of the grant to such a person being, "We duly and canonically invest you" (not your executor, &c.) "in and to the said prebend and canonry, and invest you with all and singular the rights, members, privileges, and appurtenants thereunto belonging;" otherwise one cannot but think in 500 or 600 years such a claim would have been contested, and the point by some legal decision ascertained. No distinction can be more broadly drawn in the whole law of England than that between the lay and the spiritual function and character; even the variety of cases and statutes quoted by my learned brothers who have gone before me, and which I shall not fatigue the House by wading through, establish the distinction. Certain personal rights belong to one of these characters, which do not belong to the other. The transmission of church property also stands under very different considerations from the transmission of lay property: for instance, a person seised of a freehold right is said to be seised in his demesne as of fee; a clergyman, as in this declaration, is said to be seised in his demesne as of fee in right of his said prebend or canonry. I cannot deny that many of the evils and absurdities which

I contemplate * by giving effect to Mrs. Rennell's claim * 569 will also arise in lay patronage, because it must be admitted that by giving the presentation to the personal representative of a lay patron, it may fall to a very inferior person to present ; but this evil arises out of the unfortunate situation in which lay patronage stands, but which I contend ought not to be carried one single point further, especially where the rule hardly applies, the lay patron acting in his natural, the other in a politic or corporate character. What was the origin of lay patronage? I have looked much into it, and the result of all my researches is this, that it arose in the infancy of society, and under these circumstances, that though the appointment of fit persons to officiate throughout a diocese was originally in the bishop, yet when lords of manors, and other great men of old, were willing to build churches, and to endow them with glebes and mansion-houses for the accommodation of fixed and resident ministers, the bishops, for the encouragement of such pious undertakings, were content that those munificent persons should have the nomination to churches so built and endowed by them, reserving to themselves still the right of judging of the fitness of the persons so nominated. "*Si quis ecclesiam cum assensu diocessani construxit, ex eo jus patronatus acquiritur;*" and hence have followed all the consequences of a mere lay possession, or property ; chattels, where chattels, going to the executor ; the rights of the heir, to the heir, in cases where by the common law the rights of the heir were paramount to those of the personal representative. But still the question recurs, do those rules apply to the spiritual patron ; and can the rights and property which belong to his politic character be dealt with as if he were a private person? Of this there can be no doubt, that in our law now, and I hope they ever will be, lay and * spiritual patronage are upon a * 570 very different footing. Bishop Gibson, in his Codex, p. 757, decisively marks the distinction. That very learned prelate says, and his authority upon subjects of this nature has always been considered as entitled to great respect, "The right or property which the patron has in an advowson will not warrant a plea, as it is in temporal property" (of

course, therefore, the bishop is contrasting it with an advowson in spiritual hands) "that he is seised in *dominico suo ut de feodo*, but only *de feodo*. The reason of which is given by Lord COKE, Inst. 17 a, because that inheritance (viz., an advowson) savoureth not *de domo*, and cannot serve for sustenance either of himself or his household, nor can any thing be received of the same for defraying of charges; and in the case of *John London v. The Church of Southwell*, (a) where the words of the lease were, commodities, emoluments, profits, and advantages to the prebend belonging, it was adjudged that the advowson did not pass by the said words; because, said the Court, all the words used implied things gainful, which is contrary to the nature of an advowson regularly." Why is this so? I say it is so, because an advowson in the hands of a sole corporator, a churchman, is not a matter of profit, but of naked trust merely; and the churchman who has an advowson appendant to an ecclesiastical dignity, has it as a mere matter of trust in *jure ecclesie*, which he can only exercise for the benefit and advantage of the church of which he is a member, and of which only as a member of the church could he have a right to dispose. Mr. Rennell, therefore, had only a right as member of the church of Salisbury, and the moment he expired all his rights as

* 571 * a member of that church ceased. Suppose, instead of his death, he had resigned his prebend of South Grantham, having omitted to fill up this living, could it have been for a moment alleged that he still had a right to it as fruit fallen during his holding the prebend? Am I right in stating to your Lordships that this is a matter of trust only; for upon that much of the argument has turned? I wish to found myself again upon the authority of Bishop Gibson on this point, in page 757 and 758, founding himself on the authority of Lord COKE, even in cases of lay patrons: "Guardian in socage shall not present to an advowson, because he can take nothing for it, and by consequence he cannot account for it, and by the law he can meddle with nothing he cannot account for; which said doctrine, and the plain tendency thereof, are exactly agreeable not only to the nature of advowsons, which are merely a trust vested in the

hands of the patrons by consent of the bishop, for the good of the church and of religion, but also to the express letter of the canon law ; the rule of which is, *jus patronatus cum sit spirituali annexum vendi vel emi non potest.*" In another place, the bishop says they are mere trusts for the benefit of men's souls. If this be so, in the origin of these things, even as to lay patronage, however the exercise of the right of selling advowsons and next presentations, when the churches are full, may have grown, am I not right in stating to your Lordships that the greatest difference exists between lay and ecclesiastical ; and though it may now be impossible to shake the custom of making profit of advowsons in the hands of laymen, the other has always been considered as a mere trust, to be exercised by the patron for the benefit of the church, to the due discharge of which he alone is to look, which * he alone is competent to consider with a view * 572 to the welfare and advantage of religion, in this respect committed to his sole care, and upon which his personal representative may be absolutely unable to form a judgment? It may appear to your lordships a low and unfit argument to state to this House ; but when I gave my judgment in the Court below, I thought, and I think so still, that it is one of vital importance to the interests of that church which every good man must love and revere, and to which I have never received a specious answer, except that the same inconvenience may occur in lay patronage, and which I admit. Suppose a prebendary died insolvent as well as intestate, and that all his next of kin, as they probably would in such a case, renounced administration, and that his butcher, baker, or other inferior tradesman, being a creditor, took out administration, must such person present? Is such a person capable of forming a correct judgment of a person fit for the cure of souls? And yet I defy the ingenuity of man to get out of the dilemma ; for if Mrs. Rennell is to present, the butcher or baker must, under the circumstances supposed, have exactly the same right. I lament that the same consequence would follow in lay patronage ; but I am quite sure, till compelled by the judgment of your Lordships' House, I cannot, consistently with my feelings to your Lordships nor to myself,

declaring a judicial opinion, advise that such lamentable consequences should be carried one step farther. That the presentation now under consideration is not assets of value is quite clear; it may be a chattel, but, in the hands of an ecclesiastic, a chattel of mere trust. It is admitted by every Judge and by every counsel that has spoken upon this subject, that there is a total silence in our law-books during the whole period of our ascertained law of England

* 573 upon * this precise point; although circumstances similar to the present must have existed many times. And this, to me, is a strong convincing proof that till these days of novelty no such idea was ever entertained upon this question; and I verily believe that no man now living ever before heard of such a claim being advanced. Nothing, I think, can be put in a stronger light, than was done by my learned brother, BURROUGH, when this case was before the Court of Common Pleas. The allegations of this declaration are, that the late prebendary, in his lifetime, and at his death, was seised of the prebend or canonry founded in the church of Sarum, with its appurtenances, to which prebend the advowson of the rectory of the said parish church of Welby belongs, in his demesne as of fee, in right of the said prebend or canonry. By the law of England, a prebendary or canon is an ecclesiastical sole corporation; as such, he can have no heir, he can have no personal representative; as such, his prebendal rights or property cannot go either to his natural heir or to his personal representative. Where, then, must they go? To his successor. In their corporate capacities, in estimation of law, the predecessor and successor being one, it is a continuance of the same corporate body. A prebendary or canon is a corporator in two respects; in one respect, as a member of the corporation of dean and canons, he is one of the chapter, having *sedem in ecclesiæ et vocem in capitulo*; and he is a corporator sole as prebendary. In every relation in which he stands to the church he is a corporator. I do not presume to state to your Lordships any thing particular respecting the constitution of this canonry of South Grantham, though much pains has been taken respecting it by Lord Chief Justice BEST and Mr. Justice BURROUGH,

in the Court below ; because, though there be no doubt of the authenticity of * the documents from whence * 574 their information was drawn, yet we are not judicially informed of the foundation of this particular prebend. When, therefore, in this declaration the prebendary is said to be seised in his demesne as of fee in right of his canonry, it cannot be meant a seisin to him and his heirs, for by a canon he has no heirs ; it must, therefore, mean, to him and his successors. We find in all our law-books the same law that I have above stated as to ecclesiastical sole corporations, from the highest to the lowest order of the church. Thus it is always said the prebend is vested in the spiritual incumbent ; but if we could suppose it vested in him in his natural capacity, on his death it might descend to his heir, which cannot be. The law has, therefore, wisely ordained that the spiritual person, as such, shall never die, any more than the King, by making him and his successors a corporation ; by which means all rights are preserved entire to the successor ; for the present incumbent of a spiritual charge, and his predecessor who lived centuries ago, are in law one and the same person ; but if the personal representative, or even the natural heir, were to intervene, the succession would be broken. 1 Blacks. Com. 470. The position of Lord TENTERDEN, agreeing with the majority of the Court of Common Pleas, though differing from his own more immediate brethren, has put this case in a strong and luminous point of view : “ It is clear,” says his Lordship, “ that the administratrix cannot present in right of the prebend, because the prebend is not vested in her. If, therefore, she be allowed to present, she must present in a right different from that in which the intestate would have presented ; and this will not be conformable to the general rights of an administratrix, which are those only that belonged to the person or personal property of the intestate.

* She is the administratrix of the personal rights and * 575 property of the intestate ; but I find no authority for saying that she is the administratrix of his politic rights or property also. If in the case before the Court it be held that the administratrix is entitled to present, it cannot be denied

that a right generally annexed to a prebend will, in the present instance, be exercised, not merely by a person who has not the prebend, but by a person claiming as if he from whom the title is derived, and who had the advowson in his politic capacity only, had in fact held it in his natural capacity. A decision to this effect will be contrary to the nature of the right." Some stress was laid, in arguing this case upon the stat. of 21 H. 8, c. 11, and I own I was at first impressed with the argument arising upon it. But upon considering the statute, and the motive for making it, it now appears to me to have no bearing upon the case. The statute was made at the dawn of the Reformation, and it appears that the then heads of the church, following in that respect the example of the see of Rome, exercised, or endeavoured to keep in their hands, the temporalities of the church, which belonged to them in their corporate character, whether aggregate or sole, to an unreasonable time, for their private benefit, to the great ruin and impoverishment of persons appointed to livings; the statute deprived them of that right, and gave the benefit to the new incumbent, from the death of the last, and to the executors of such new incumbent, if he should happen to die before he realized those interests which the statute thus gave to him. Much stress has also been laid, both at your Lordships' bar and at the bar of the Courts below, on the options of the archbishops, which I admit are allowed to be the subject of devise, and may go to

* 576 executors. But I answer, that they are anomalies * in the law, and the exception proves the general rule. They were originally, Mr. Justice BLACKSTONE thinks, derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury, and that right has been continued to the archbishops in their respective provinces of Canterbury and York, even after the power of the popes has ceased in this country. But all these anomalies, I again repeat, support my general argument to show that the rights of lay and ecclesiastical persons stand upon a totally different foundation; and that the law, attaching as it may upon property of this description, in the hands of a lay person, does not attach upon the same species of property in the hands of

one who holds *jure ecclesiae*. The case of *Repington v. The Governors of Tamworth School*, (a) has been much pressed; but it is difficult to ascertain the grounds of that judgment. It was the case of a donative, and Lord TENTERDEN thinks that the decision may have proceeded on the ground that the Court thought the rule as to presentative benefices in lay hands not well founded, and therefore not to be extended. A donative is, however, of a very peculiar nature, and therefore any decision respecting that may be considered as anomalous also. And, indeed, Mr. Justice BLACKSTONE, vol. 2, p. 24, speaking of donatives, considers them as exceptions; for he says, "These exceptions to general rules and common right are ever looked upon by the law in an unfavourable view, and construed as strictly as possible." If, therefore, the patron of a donative, in whom such peculiar right resides, does once give up that right, by presenting his clerk to the bishop, and procuring institution and induction, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever, *and will *577 therefore reduce it to the standard of other ecclesiastical livings. The ground of my opinion is, that this species of interest in the case of spiritual patrons, whether aggregate or sole, is a mere personal trust to be exercised by him or them in the spiritual character, which he cannot, consistently with his high duty, if he be a sole corporation, either devolve upon another during his life, or at his death leave to be exercised by his heir or personal representative. He holds *jure ecclesiae*, and in that right only; if he had it not in that right he could not have it at all; and when he dies, all his rights, powers, and privileges derived from the church absolutely cease, as if he had ever existed. This is no new notion; for that laborious and learned writer upon ecclesiastical law, Dr. Burn, in his 2d vol. 7th edit. p. 92, title Dean and Chapters, observes (Dr. Godolphin having said that after the death of a prebendary the dean and chapter shall have the profits): "But by Statute 28 H. 8, c. 11, the profits of a prebend during the vacation shall go to the successor." Dr. Burn reconciles this apparent contradiction thus, which bears on

(a) 2 Wils. 150.

the discussion now before your Lordships: "The issues of those possessions which he has in common with the rest of the chapter (that is, a corporation aggregate) shall after his death be divided amongst the surviving members of the chapter; but the profits of those possessions which he has in his separate capacity as a sole corporation of himself, shall be and enure to his successor." Dr. Burn seems well supported in this distinction, by the case of *Young v. Lynch*. (a) Therefore, if a member of a chapter, which is an aggregate corporation, should die after a living had become vacant, it seems

to me that his personal representative might as well
 * 578 contend for a voice * in the chapter as to the filling it up, as that such representative might have it to himself exclusively, where a living belonging to the intestate as a sole corporation merely; although Dr. Burn more justly says in that case, "it would go to the surviving members of the chapter; in the other, to the successor." When Bishop Gibson says advowsons may be granted by deed or will, &c., he is evidently speaking of lay patronage only; for he adds, "This general rule is to be understood with limitations, that it extends not to ecclesiastical persons of any kind or degree who are seized of advowsons in right of their churches; all these being restrained (as to bishops, by stat. of 1 Eliz., and the rest by 13 Eliz.) from making any grants but of things corporeal, of which a rent or annual profit may be reserved; and of that sort, advowsons, and next avoidances, which are incorporeal, and lie in grant, cannot be." This distinction between laity and clergy pervades every page of our ecclesiastical history; and those well versed in the history of our venerable church will immediately recognize the justice and accuracy of those principles I have been endeavouring to establish.

It is well known that in the early periods of the church-history of this country, the *parochia* or parish was the episcopal district. The bishop and his clergy lived together at the cathedral church, and all the tithes and oblations of the faithful were brought into a common fund, for the support of the bishop and his college of presbyters and deacons, for the

(a) Sayer's Rep. p. 84.

repair and ornament of the church, and for other works of piety and charity. At this time, and in the infancy of society, the stated ordinances of religion were performed only in these single choirs, to which the people of each whole diocese or *parochia* resorted, especially at the more solemn seasons of devotion. But in order to supply the inconvenience

- * of distance from the mother church, the bishop was * 579 wont to send forth some of his clergy to preach and dispense the word and sacraments, and these missionaries returned to give to the bishop a due account of their labours and success. As the wants of society for spiritual instruction increased, and when the members of the episcopal college found it inconvenient to go forth, certain churches were allotted, some by laymen (where they had the patronage given them as a compensation for having built and endowed churches, and hence the origin of lay patronage, as before shown), some by the bishops of the prebendal body at large, some to one particular member of the body; all which may be seen by those who will take the trouble of looking into the ancient records of the church. Thus these churches which were not in lay hands became prebendal; and the supply of the duty was left to the aggregate corporation, where the perpetual advowson was in the whole community of the dean and chapter, or to that sole corporation, or single canon, or prebendary, who was to have his prebend or exhibition from it. In progress of time the representative curates, who were to account for their profits, and only to receive a small stipend for their services, were so ill paid, that the bishop obliged his clergy who had such advowsons to retain fit and able capellans, vicars, or curates (for these are all nearly of the same import), with a competent salary. This failing, the bishop again interfered, and obliged the clergy
- (that is, the chapter, or that single prebendary, in whom the perpetual advowsons in right of the chapter, or in right of his prebend, of which he was seised *jure ecclesie*, was vested) to make the presentation to spiritual persons to be endowed and instituted, who should thenceforth have no more dependence upon their spiritual, than others * had * 580

upon their lay patrons, with a competent maintenance to be assigned by the bishop.

Much of this information may be inferred from the Stat. 15 R. 2, c. 6, and the 4 H. 4, c. 12.

I have not thought it necessary, in giving this detail to your Lordships, to refer to authorities, but what I have advanced will be found as the early history of our church, in various books well worthy the attention of the curious: such as Spelman *de non temerandis Ecclesiis*; Bish. Kennet on Impropriations; and Burn, title "Appropriation." But I have presumed to trouble your Lordships with this short history of the church, because it seems to me to prove incontrovertibly, that what is thus vested in the churches for spiritual purposes vests in them as a body politic, and can never be allowed to fall into the private common stock of the body at large, or of the individual sole corporator. And it will be found, that what is said of the church at large, is no less true of the church of Salisbury, as was luminously shown by Lord WYNFORD and Mr. Justice BURROUGH in the Court below; and much is to be found in 3 Dugd. Mon. 371. Thus, then, an ecclesiastical person, during his incumbency, is entitled to all the profits that may fall of a chattel nature: but when a living falls vacant to which he has a presentation in right of his church, as it is not a matter of profit, he merely presents *quasi* incumbent.

I have shown to your Lordships that the living, in the present case, was probably endowed out of the prebend, or the advowson attached to the prebend of South Grantham; in either case, the prebendary, as a sole corporator for the time being, has the right of presentation, and when there is an avoidance he may present in right of his church: he * 581 presents as a trustee; * the trust is personal, without profit, and cannot be transmitted: how then can a private personal representative of a deceased prebendary, who dies after avoidance, but before presentation, claim the presentation? Is it that he makes it a *chose in action*, out of which to pay the debts of testator or intestate? That cannot be, for it is not assets. Does he claim to present because this trust had devolved upon, or as it were become vested in,

the testator or intestate? The trust has indeed devolved upon him, but not in his own right, but, as the declaration truly states, in right of his prebend: the presentation is in him, not for his own use or benefit, but for the use and benefit of the church, confided to his spiritual not to his lay hands, for the dignity and ornament of the church; a trust which he, and he only, must execute upon his great personal responsibility, for the cure of souls, and for the advancement of the interests of religion; a duty which his personal representative, in his natural capacity, cannot in law be deemed qualified to discharge.

I fear I have fatigued your Lordships with the length of the argument; but as some of my brethren unfortunately differ from me, I could not satisfy my conscience upon this great, and, as I think, awfully momentous question, without satisfying your Lordships that I have not come to the conclusion I have done without most anxious consideration and deep research. The result, then, of my opinion is this, that whatever is attached to a spiritual sole politic body, sinks with the death or resignation of the party who possesses that right.

MR. BARON BAYLEY.—As the opinion I delivered when this case was before the King's Bench is in print, and as I see no reason to vary from any of the grounds upon which that opinion was founded, I shall not be *obliged to *582 detain your Lordships at any considerable length. I take the general rule, with the single exception of benefices in the gift of bishops, to be, that where a benefice becomes vacant, the right to present is immediately detached from the estate which gives that right; it vests, as a mere personal power of presenting, in the individual who had the right of patronage at the time that vacancy occurred, and will continue in him and his personal representatives, let what will become of the estate which gave such right.

Therefore, if the right to present to an advowson appendant, or an advowson in gross, when a vacancy occurs, be in tenant in fee or tenant in tail, and he die without presenting, though the estate will pass to his heir or devisee in one case, and to the issue in tail or remainder-man in the other, the

right to present will devolve on his executor or administrator. F. N. B. 33, p. 34 b ; Co. Litt. 388 ; Dyer, 283 a ; 21 H. 7, pl. 6 ; Bro. à l'Eglise, pl. 34. If the right to present where a vacancy occurs be in tenant *pur autre vie*, or in a termor, and before he presents *cestui que vie* dies, or the term expires, so that the estate which gave him the right to present is gone, that right nevertheless remains in him, and he may still present. F. N. B. 34 b ; Bro. Presentation à l'Eglise, 22. Again, if husband and wife be seised in fee or in tail, or in right of dower in right of the wife, and the church become void, and the wife die before the husband present, though the fee descend upon her heir, or the estate in tail passes to the heir in tail, or the estate in dower ceases, the right to present remains in the husband. 21 Hen. 6 b ; 38 Heb. 6, 36, 6 ; 14 Hen. 4, 12 ; Bro. Presentation à l'Eglise, pl. 22 ; Co. Litt. 120 ; and if a vicarage become vacant, and the parson to whom the right of presentation belong be made bishop, whereby
 * 583 his right in * the parsonage ceases, he shall nevertheless present. F. N. B. 34, n.

So, had Rennell been promoted to a bishopric, would he have lost the right ? The general rule, however, will probably be admitted ; but its application to the present case is denied, and the ground of that denial is, that the present case is an exception ; first, because Mr. Rennell was a spiritual corporation, and had this right of presentation annexed to a spiritual dignity, and clothed with a spiritual trust. My answer is, that though Mr. R. was a spiritual person, it was not till the statute of Car. 2 necessary that he should be so ; that the dignity to which the right of presentation was attached was not in its creation spiritual ; and that if it were, it was not clothed with any spiritual trust. Mr. R.'s dignity was a prebend only, and at common law a layman might be a prebendary. *Bland v. Maddox. (a)*. A prebendary has no cure of souls ; he is called prebendary, because his duty is *præbere auxilium episcopo* ; he has his possession annexed to his prebend, to enable him to provide for himself and family. It is by the restraining statutes alone that he is prevented from alienating, with consent of the patron and ordinary, all

(a) Cro. Eliz. 79.

his possessions, to the deprivation of his successor ; and he has of himself the full power of alienating them, so as to bind himself, and it is not of necessity that he should have any possessions. It is only under 13 & 14 Car. 2, c. 4, § 14, that he must be in holy orders. 3 Co. 75 b ; Dyer, 61 b, pl. 30 ; 58 Edw. 3, 24 ; 2 Rolle's Ab. 341. But admitting that a prebend were a spiritual dignity, does it follow that church preferment, in the gift of the prebendary, in right of his prebend, is clothed with a spiritual trust ? Is the spiritual preferment * to which a bishop is entitled in right of * 584 his see, clothed with any spiritual trust ? May he not grant away the next avoidance of any church, though the avoidance be in gross, which he as a bishop is entitled to fill ; or as many avoidances as shall happen within his own time ? And will not such a grant bind himself ? Watson says, he may make the grant, and it will bind him. Watson, c. 10, p. 135, 136 ; c. 45, p. 873. If an advowson be appendant to a manor usually let, and a lease be made thereof, it will at all events bind the bishop who made it, and his lessee shall present. Gibson, 797, says, " Advowsons may be granted by deed or will, either for inheritance, or one or more turns. But this extends not to ecclesiastical patrons seised in right of their churches, nor to colleges or hospitals seised in right of their houses ; for they are so far restrained by the statute of Elizabeth, that their grants, though confirmed, will not bind their successors. But they will bind the grantors, for their own times." And if they be made conformably to the statutes, they will bind the successors. Watson, c. 10, p. 137 ; c. 45, p. 875, 876. In *Smallwood v. Bishop of Coventry*, (a) the bishop had made a grant of the next avoidance of an archdeaconry (a spiritual dignity) ; he afterwards disturbed the grantee, the grantee died, and his executor brought a *quare impedit*, and the bishop's grant was held good, and the executors had judgment. In *Foord's Case*, (b) a prebendary of this very church made a lease of a rectory, part of his prebend, for seventy years. The dean and chapter confirmed it for fifty-one years ; the successors disputed it within

(a) Cro. Eliz. 207.

(b) 1 Ander. 47 ; 5 Co. 81 ; Dyer, 338 b ; Cro. Eliz. 447, 472 a.

five years. Watson says, it would have been good for his own time, without confirmation. Watson, 48. And

* 585 all * the Court (except JEFFERY) held it good for the fifty-one years. In *London v. Chapter of Southwell*, (a) where plaintiff claimed in *quare impedit*, as lessee of a prebend to which the advowson belonged, the question was whether the lease had words sufficient to carry the prebend or not; and it was only because the words were not sufficient that the decision was against the plaintiff. Presentation to a vicarage belongs of common right to a parson; but by consent of patron and ordinary, he may grant it to another. F. N. B. 34. The case of *Sharnock v. Boucher* (b) seems to show the distinction between what is clothed with a spiritual trust, and what is not; and what may be alienated, and what cannot. A prebendary leased his prebend for three lives; and whether that passed the right to fill the office of commissary within the prebend, was the question. The Judges agreed that it did not, if the right belonged to his spiritual functions; but on that point they were divided.

The only remaining point is founded upon the rule which prevails in the case of the King and a bishop, and a supposed analogy between that case and this. Where a bishop dies, leaving a church in his gift vacant, the King is to present, not the executors of the bishop. And if this rule be founded upon the spiritual character of the act of presenting, it is an authority in this case. If it be founded on the relation between the bishop and the King, and is referred to the King's prerogative, it is not; and I am of opinion it is referable to the relation between the bishop and the King, as to the King's prerogative. The King is the sovereign patron of every bishopric, 6 Edw. 3, 40; and though he gives the

* 586 chapter leave to elect, the patronage is in him, * 6 Edw. 3, 40. And upon the death of a bishop the see comes to the King as the bishop left it; and if a deanery or a stall be left vacant, the King shall fill it up; 6 Edw. 3, c. 40. A prebendary of Abergwilly died; the bishop (of St. David's) died; the temporalities were seised into the King's hands. A new bishop was appointed, and filled up the stall. The

(a) Hob. 303.

(b) Sir T. Raym. 88; 1 Lev. 125.

King brought *quare impedit*, and it was adjudged that he had right, and a writ was awarded to the bishop. *Rex v. Bishop of St. David's.* (a) The temporalities come to the King as founder by presumption. Mall. 65, n. to pl. 6. And this is so high a prerogative, and so far incident to and inseparable from the Crown, that a subject cannot claim it by grant or prescription. Mall. 65, n. to pl. 6. And if the King die, *sede vacante*, the succeeding King shall have the temporalities, not the King's executors. Mall. 65, n. to pl. 4; Bro. Chatt. 2; 2 Roll. Abr. 211. And if the King die, leaving a church void, the succeeding King shall present. *Semble*, Mall. 65, pl. 4, & n.; Mall. 42, pl. 16; Bro. Chatt. 2; 2 Roll. Abr. 211. And this though the church became void in the bishop's life, and though the new bishop has sued out his livery out of the King's hands before the King presents. Mall. 65, pl. 5; 2 Roll. Abr. 343, pl. 5; Wats. 73; F. N. B. 33, n. In the case of a bishopric, therefore, if the bishop dies, whatever spiritual preferment in the gift of the bishop was vacant at the bishop's death, and whatever shall become vacant till the see is filled up, devolves upon the Crown, and is inseparable from the Crown; so that the Crown cannot grant it away; and in case of the demise of the Crown, it will pass, not to the executor of the deceased King, but will accompany the Crown, and go to the succeeding King.

* Upon this, two observations occur: one, that in * 587 the case of the Crown, and in the case of the Crown only, can a sole corporation, which the King is, take a chattel by succession; so that what is a rule in the King's case, where the right to present may, by reason of the prerogative, pass from the bishop to the King, from the King to the King, will not apply to the case of a prebendary, where there is no such prerogative to pass the right from prebendary to prebendary. 16 Vin. Q. 14. The other, that what is the case with the Crown with reference to a bishop who holds *per baroniam*, is the case with every other tenant *in capite*, where the tenancy, by reason of infancy in the heir, becomes as it were suspended, and the tenancy returns in wardship to the King. Co. Litt. 388 a is express upon this point, and puts

(a) 50 Edw. 3, c. 26.

the two cases together ; that of the King's tenant *in capite*, and that of a bishop. If the King's tenant by knights' service *in capite* be seised of a manor to which an advowson is appendant, and the church be void, and the tenant die (leaving his heir in ward), the King shall present, not the executor ; and if a church in the gift of a bishop become void, and the bishop die, the King shall present, and not the executor. Co. Litt. 388 a. The right, therefore, of the King, in case of a bishopric, appears to me to be referable not to the spiritual character of the person from whom the right comes, but to the King's prerogative, because it obtains equally in the case of every tenant *in capite*, whether he be a spiritual person or not.

Upon the whole, therefore, I am of opinion that the general rule is, that if a church become vacant and the patron die, the right to present devolves upon his executor ; and this is the rule also when a prebendary in right of * 588 his church is patron, because, until the statute * of Car. 2 (13 & 14 C. 2, c. 4, § 14), it was not necessary a prebendary should be a spiritual person, and because in the case of spiritual persons their right to present to churches is temporal, not spiritual, inasmuch as they only grant it away when a vacancy occurs as they may their other temporal possessions ; and that the excepted case of a bishop is not applicable to other spiritual persons seised of advowsons in right of their dignities or churches, because the case of a bishop is referable to the prerogative of the Crown, which enables the Crown to take a chattel in succession, and to the relation in which the Crown stands to a bishop, the bishop being tenant *in capite* to the Crown, not to the spiritual character of bishop, nor to any spiritual nature in the right. My answer, therefore, to the question proposed by your Lordships is, that, in the case that question propounds, the right of presenting belongs to the executors of the prebendary.

Mr. Baron BOLLAND, after stating the question, said : — It is highly probable that the state of facts out of which this question arises, has, in very many instances, existed, and it is remarkable that no light is thrown upon the subject by any

decision at law, nor by any practice of the church, upon a presentation to a benefice under circumstances precisely similar to the present. If any such decision exist, it has escaped the industry of the experienced counsel who argued this case in the Court below, and at the bar of this House, and the researches of the learned Judges of those Courts, whose inquiries were so sedulously directed to the discovery of some authority upon which their judgment might be founded. It is to principle, therefore, and to cases analogous to the present, if any can be found, that the * attention is to be turned, in order to arrive at a sat- * 589
isfactory conclusion.

In pursuing this inquiry, I do not mean to dispute that by the law, as it stands, if a presentative church, the advowson of which belongs to a layman, become vacant, and the lay patron die without presenting, his executor shall present, and not his heir nor his devisee, or the next owner of the advowson, it being considered that the next turn is a chattel; though this seems to have been doubted in the case of *The Queen v. The Archbishop of Canterbury, Fane and Hudson*, (a) and the Court left it undecided. The distinction which I shall endeavour to make will be, that the right of the owner of an advowson does depend, though the contrary is contended for on the part of the defendant in error, upon the character in which he holds; and that as the deceased was seised of and in the prebend of South Grantham, with its appurtenances, to which prebend the advowson of the rectory of the parish church of Welby, with its appurtenances, belonged, in his demesne as of fee, in right of the said prebend, the right of presentation to the church, when it should become vacant, arose out of his office of prebendary, was a spiritual trust, to be executed for the support and for the promotion of the welfare of the established religion, and that to him, and to him alone, was confided the choice and appointment of an incumbent. It appears from history, that for six or seven centuries the *parochia* was the diocese, or episcopal district; there was the residence of the bishop and his clergy at the cathedral church; all tithes, offerings, and ecclesiastical prof-

(a) 4 Leon. 109.

its belonged to the bishop and to his clergy, for their support, for the repairs and ornaments of the church, and
 * 590 * for other works of piety and charity. Such community and collegiate life of the bishop and his clergy was the practice of the British, and was afterwards adopted by the Saxon, church.

Many causes contributed to the existence of parochial churches. In some places the liberality of the inhabitants raised them, and by supplying preachers with houses, induced them to settle and become the pastors; kings founded free chapels, for the purpose of worship for their court and retinue. The bishops, too, to plant and encourage Christianity amongst the people, built churches; but the great source from whence the increase of the numbers of buildings for divine worship arose, was the piety of the great lords, who, having large possessions and territories, founded churches for the use of their families and tenants, within their respective domains; and hence it seems a title to patronage in laymen first sprung: hence the boundaries of parishes became commensurate with the extent of manors; hence the several portions of the same church were divided according to the separate interests of the several lords. But, although, for the purpose and in the hope of more firmly establishing religion, and more widely extending its divine influence, these changes in the constitution and management of the church were permitted, the right of the bishop, either in respect of spirituals or temporals, was not invaded. • He still had the cure of souls, and a title to all the ecclesiastical revenues within his whole diocese; by his authority and consent priests were ordained, as assistants given to him; no church could be used for public worship till consecrated by him; no priest could officiate there without his delegation.

From the causes I have above stated, the privilege
 * 591 * of nominating fit persons to officiate in churches, which the piety and liberality of private persons had founded or endowed, was given; and the bishops were content, in such cases, to forego the privilege of appointing the ministers who were to perform the duties in such churches. This power was conceded to the founders or benefactors

ratione foundationis, where they were founders; *ratione donationis*, where they endowed the churches; and *ratione fundi*, where they gave the soil upon which they were built; the bishops reserving only the power of deciding upon the fitness of the persons nominated. (a) In process of time this practice became the law of the church. The church having made these concessions, and having thus parted with the right of presenting, it became a matter of indifference to the bishops, whether upon the death of the lay owner of an advowson, during the vacancy of the church belonging to it, the right that the patron, had he lived, would have exercised, should go to his heir, or should belong to his executor; the church left that question to the courts of law to determine, and I am bound to admit that, in such cases, the claim of the executor is established; but I cannot apply that rule to the case in question, because the advowson, of which the late prebendary of Grantham was seised, was given to him as a member of the church of Salisbury, was appendant to an ecclesiastical dignity, and is not to be governed by the same law as is applicable to the advowson in lay hands. If I am wrong in taking this view of the question, the error arises from my considering the right of the executor of a lay patron to be an exception from the rule which governed property of this description in the hands of the church, as there appears to be a manifest * distinction between lay and * 592 spiritual property. In the note upon the 10th section of Littleton, it is said, (b) “of an advowson, wherein a man hath an absolute ownership and property, as he hath in lands and rents, yet he shall not plead that he is seised in *dominico suo ut de feodo*, because that inheritance, savouring not *de domo*, cannot either serve for the sustentation of him and his household, nor can any thing be received for the same for defraying the charges, and therefore he cannot say that he is seised therein in *dominico suo de feodo*.” In the section of Littleton, upon which this is a commentary, the author is treating of an advowson in lay hands, and these authorities are adduced by Gibson in his Codex, (c) in speaking of spiritual property, to illustrate the difference he points out. In the

(a) 1 Co. Litt. 119 b.

(b) Co. Litt. 17 b.

(c) P. 757.

pleadings in the present case, the prebendary is alleged to be seised of the advowson in his demesne as of fee ; and why is it so pleaded ? the answer is, it is not a lay title ; but that, to use the language of COKE, it savours *de domo*, may be made serviceable, for the sustentation of him as a spiritual person, and his household. The case of *London v. The Chapter of the Collegiate Church of Southwell*, (a) is a further proof of the distinction I have taken between lay and spiritual property. I shall next call the attention of your Lordships to the ecclesiastical character of the officer in whom, till his death, it cannot be denied the right of presentation was vested ; to the object of the founder of the prebend ; and to the nature of the property with which he endowed it. A prebend, as defined by Dr. Cowell, is the portion which every member or canon of a cathedral church receiveth in the right of his place, for his maintenance. So *canonica*

* 593 *portio* is properly * used for that share which every canon or prebendary receiveth out of the common stock of the church ; and *prebenda* is a several benefice arising from some temporal land or church appropriated towards the maintenance of a clerk or member of a collegiate church, and is commonly named of the place where the profit groweth. And these prebends be either simple or with dignity. Simple prebends be those which have no more than the revenue towards their maintenance. Prebends with dignity are such as have jurisdiction annexed to them, according to the divers orders in every church. Of the object of the founders of prebends, there cannot be a doubt ; it was to provide for the maintenance and support of the prebendaries ; and it cannot be supposed that it was the intention of any founder that the instalments of the prebend should be appropriated beyond the life of the party in possession. I shall not stop to inquire whether this charitable intention of founders has not been in a great measure defeated ; but I shall confine myself to the consideration of whether the particular right contended for by the executrix is founded upon any decision, or can be supported upon principle. It is admitted on all hands that no authority is to be found on the subject ; let us then

(a) Hob. 303.

look to the character of the person under whom the right to present to the church of Welby is claimed by the defendant in error. He was an ecclesiastic; as a layman he could not at this day have enjoyed the dignity; the office was conferred on him by the church; its emoluments and profits were intended by the founder for his support; to him was confided the sacred trust of providing a proper minister for the church appended to his prebend. Looking back to the times when similar benefactions were bestowed upon the church, no one can hesitate to be convinced that the founder of the prebend of South * Grantham intended the prebendary * 594 to become incumbent of the church, or, at least, that he should (unless provided for in such a manner as to render the living of Welby untenable) have the power of being so. The selection of the prebendary by the bishop was a voucher for his piety, and a sanction and authority to him that in presenting himself, or any other clerk, the true interests of religion would be promoted. Can it be contended that the trust can be carried further? To do so is to put into the hands of a stranger to the church, a trust, the execution of which was confided to a member of its own body; is to divert the course of the founder's bounty into a different channel from that in which he intended it should flow, and to establish a precedent by which the best interests of the church (I admit the instances would, probably, be few) might be affected. If I am correct in considering an advowson in the hands of a prebendary in right of his prebend, as a separate trust which is vested in him *jure ecclesiæ*, it should be inquired whether such a trust can be transferred to another, or whether it survives, and will go to the representative of the deceased person in whom it was placed. I find in *Colt and another v. The Bishop of Lichfield and Coventry*, (a) it is said that "if a lapse incur, and then the ordinary die, the King shall present, and not the executors of the ordinary, for it is rather an administration than an interest." Fitz. N. B. 34 (G.); 25 Edw. 3, 24; Dyer, 87. The case of Chester College is doubtful, whether to the King or to the metropolitan. So again, Hob. 154, "a lapse, as I have said, is an

(a) Hob. 154.

act, an office of trust reposed by law in the ordinary, metropolitan, and, lastly, in the King; the end of which
 * 595 trust is * to provide the church with a rector in default of a patron, and yet as for him and to his behoof; and, therefore, as he cannot transfer his trust to another, so cannot he divert the thing wherewith he is trusted to any other purpose." The reason given by the learned Judge why the presentation does not go to the executors of the ordinary, viz., that it is an administration rather than an interest, appears to me mainly to fortify the position for which I am contending.

I cannot fail also to pray in aid the weight that is to be derived from the further consideration of the legal character of a prebendary. He is an ecclesiastical sole corporation; and, as such, he can have no heir nor personal representative. To his natural heir his prebendal rights cannot pass, nor can they vest in his personal representative; but the right of presenting to the vacant church must remain unserved and in abeyance till the appointment of a successor. In treating this matter, I have not commented upon, nor attempted to remove the effect of those arguments that have been drawn from several of the authorities that have been relied upon in support of the claim of the defendant in error, because as they have proceeded upon lay patronage, they have, in the view I have taken in the subject, no bearing upon the question.

From what I have said, your Lordships will have collected, that the opinion to which I have come is, that if an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation does not belong to the personal representative of the deceased prebendary.

Mr. Justice LITLEDALE simply expressed his concurrence with the majority of the Judges, intimating that
 * 596 * he saw no reason for altering the opinion which he had given in the Court below.

LORD CHIEF JUSTICE TINDAL. — My Lords, upon the best consideration I can bring to this case, I have come to the

conclusion, that the right of presentation belongs to the personal representative of the late prebendary; but, at the same time, I am ready to admit it is after considerable doubt upon the question which has been submitted to us by your Lordships. If I felt myself at liberty to look at the particular foundation of this prebendal stall, or to consider upon general principles what might be most fitting and expedient, in the case of patronage belonging to an ecclesiastical corporation, such as is a prebendary, I could bring myself without difficulty to the conclusion, that the right to fill up the turn which was vacant at the time of the late prebendary's death, ought to devolve upon his successor, and not to go to his personal representative. But neither upon the abstract question proposed by your Lordships nor upon the facts stated on the record in this case, can I take judicial notice, either of the circumstances attending the original foundation of this prebend, the endowment thereof with this particular advowson, or the form of presentation which has been used and adopted on occasion of former vacancies. And as to any considerations derived from general expediency, I feel myself restrained from entering into them, because there appears to me to be an analogy of sufficient strength and certainty, to bring the present case within the reach of acknowledged principles of law, and within the authority of various decided cases. It is upon the ground of this analogy which exists between the present case and those principles and authorities, that I feel myself bound to concur in the opinion which has been *expressed by the majority of his Majesty's Judges, *597 thinking it a safer course upon this occasion, as I find has been the opinion of other Judges from the earliest periods of the law, to adhere to any rule which can be safely inferred from the cases, rather than to substitute another, although it may appear upon general principles more reasonable and more just. I assume it to be settled law, admitting of no doubt or dispute, and not requiring to be supported by reference to any authorities, that where an advowson presentative is vested in any person in his natural capacity, either in fee or for life, and the church becomes void, and the owner dies after such avoidance without making any appointment, the

right to appoint to the vacant term belongs to the executor, and not to the heir or to the next owner of the advowson. Indeed, so clearly is this principle recognized, that all the books concur in calling this vacant turn a chattel vested in the testator (Fitz. N. B. 33, P. 34, N. ; 4 Leon. 109). In the case in Fitzherbert's N. B. 33, P., it is stated, "If a man be seised in fee, in gross, or in fee appendant unto a manor, and the advowson becomes void, and he dieth, his executor shall present, and not his heir, because it was a chattel vested and severed from the manor." If the chattel is severed from the manor in that case, why may it not be considered as severed from the prebend in this? and if once severed it is difficult to assign any legal principle upon which it can be reunited. Unless, therefore, some solid ground can be laid down, upon which a distinction can be made between a prebendary seised of the advowson in right of his prebend, and a person seised in his own natural right of a manor to which an advowson is appendant, there can be no doubt but that the case falls within the general rule, that the right to present is a chattel interest, and would go to his personal

* 598 representative. * It will be advisable, therefore, to refer to some of the cases and principles which carry the analogy more closely to the particular question now under discussion. In Fitz. N. B. 34, N., is found this case, "If a vicarage happen void, and, before the parson present, he is made a bishop, &c., yet he shall present unto this vicarage, because a chattel vested in him." The authority referred to is 24 Ed. 3, 26.; but the case, which is not to be found in the Year Book, will be found inserted nearly in the same words in Fitz. Abr. Quare Impedit, 22. In that case, as in the present, the patron was seised *in jure ecclesiæ*; and notwithstanding he ceased to be rector, he still carried with him in his natural capacity this chattel interest, the right of appointing to the vacancy. In that case it was held that the chattel interest which had once vested in him did not afterwards reunite with the corporation sole, the parson. That case appears to me to be a direct authority upon the present question, to this extent, that if the living had become void, and the prebendary had vacated the prebend, the right of

appointment would have belonged to him, not to his successor. If so, and he still retained the right to appoint, notwithstanding his *cesser* of the prebend, on what principle shall his death be held to reunite the presentation with the prebend from which it has once been severed? The case in 2 Rolle's Abr. 346, f., pl. 4, shows the law where the avoidance of a vicarage happens after the vacancy of the rectory, and before the new rector is appointed: "If the parson has the right to present to the vicarage, yet if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage shall present." So that, although the rector be in the nature of an ecclesiastical corporation sole, and although the rector be seised of this right of presentation *jure * ecclesiae*, yet it shall not devolve to the suc- * 599
cessor; but if it happen before the vacancy, the former rector shall still appoint; if during the vacancy, the patron. Both which cases are strong to show there is no indissoluble union between the right of presentation and the prebend itself. To which may be added the case stated in Fitz. N. B. 33, P., "That if a bishop die, seised of a manor to which an advowson is appendant, and the advowson happen void before his death, the King shall present unto the same, by reason of the temporalities, and not the bishop's executor." The reason is, that the King takes the temporalities by reason of his prerogative, and the turn being once vested in him, cannot be got out of him but by matter of record. Now, although the express point adjudged by that case does not apply here, because there is no prerogative in this case; yet it furnishes an observation which appears not unimportant. Fitzherbert puts this case in apposition with that which had immediately preceded it, namely, the case in which he has stated, "The executor shall present and not the heir, because it was a chattel vested and severed from the manor," &c. He then puts the case of the bishop, and the inference to be drawn is, that, but for the prerogative, the executor would have presented; otherwise he would not have said, the King shall present, and not the bishop's executor: the observation would have been, the King shall present, and not the successor. If this is a just inference, the authority of the

case last referred to would go the length of deciding the present; if the executor of the bishop would be entitled to present to the turn which fell vacant in the bishop's life, and which belonged to the bishop *jure ecclesiæ*, had not the prerogative stepped in and prevented him; it would follow in the present case, where no such prerogative exists,

* 600 * that the executor has the right to present to the vacant benefice.

The power of the prebendary to grant the next turn to a stranger before it becomes vacant, affords a further argument against the notion, that the right of presentation is to be considered as inseparably annexed to the prebendary himself for the time being, on the ground that it is an ecclesiastical trust to be exercised by him only to whom the presentation has given it. Such grants are of very frequent occurrence in the old Books of Entries containing pleadings in *quare impedit*, and it is impossible to conceive they should be found there unless the practice was common, or that they could have been put upon the record, if such grants were against law: inasmuch as the plaintiff deriving title under them, would only be showing the insufficiency of his right to sue.

Again, the universal practice of grants made to the archbishops by bishops of their province, of those rights of presentation well known by the name of options, furnish at least the inference, that though the right to present comes to an ecclesiastical person by virtue of his ecclesiastical character, still there is no rule of law that it must be exercised in person, but the law allows it to be transferred to another. It may, indeed, be said, that this is not a transfer to a layman or a stranger, but merely to an ecclesiastic of the same or higher dignity; and therefore the ecclesiastical trust may be presumed not to be violated by such transfer of its execution. Admit it to be so; still, how can we reconcile to that principle the right which the archbishop has to devise these options to any one he chooses to select? And that such power exists, appears from the case of *Potter v. Chapman*, (a)

where the only question before Lord HARDWICKE

* 601 * is made upon the propriety of the particular ap-

(a) Ambl. Rep. 98.

pointment by the trustees under the archbishop's will, but none whatever upon the right of the testator to bequeath them to his trustees. If, then, the bishop may sever and disannex from his bishopric a right of presentation, to which he becomes entitled *jure episcopatus*, and not otherwise; still further, if the archbishop to whom the grant hath been made may bequeath it to a stranger by his will, or, what is an identical proposition, if it would devolve upon his personal representative in case he had made no such bequest; it will surely be dangerous to build an opinion that the presentation now in dispute must belong to the successor, on the ground that it is of an ecclesiastical character, in the nature of an ecclesiastical trust, and by reason thereof must be exercised by the person who fills the prebendal stall, and by him only. So that the doctrine laid down in the Doctor and Student would appear to be correct, where no distinction whatever is introduced between presentations made by laymen, or presentations made by ecclesiastical corporations, between advowsons appendant to manors, or advowsons appendant to offices of the church, but it is laid down generally thus (see Dial. 2, c. 26): "It is holden in the laws of the realm that the right of presentment to a church is a temporal inheritance, and shall descend by course of inheritance from heir to heir, as lands and tenements shall, and shall be taken as assets, as lands and tenements be." And again, "the goods of spiritual men be temporal, in what manner soever they come to them, and must be ordered after the temporal law, as the goods of temporal men must be." Now, if the vacant turn in a benefice be a chattel interest, as the authorities above referred to seem abundantly to show, if it passes by grant, is devisable by will, or in case of no bequest, * goes to the personal representative, then, indeed, is * 602 the passage above cited a strong proof of the opinion of learned men, at the early period when that book was written, that no just distinction can be taken between a right of presentation vesting in a spiritual man, by whatever means it may come, and a similar right in a layman. It affords a further argument that the right to present to the vacant living cannot devolve upon the successor and go along

with the prebend, that a prebendary is a corporation sole; and that by law, a corporation sole is incapable, except by custom, of taking in succession chattels real or personal, either in possession or action. (Co. Litt. 9 a, 46 b; Hob. 64). If this be the law, how can this vacant turn, once severed from the prebend, become reunited, or descend with the corporation sole? That such would be the case as to some of the profits of the prebendal stall, where they fell due in the lifetime of the predecessor, appears clear. Rent which accrued due in his lifetime would go to his executor: for the Stat. 28 Hen. 8, c. 11, gives to the successor the rent only which accrues during the vacancy; leaving the right to the rent due in the predecessor's lifetime where it then stood, that is, as a *chose in action*, or a personal chattel, which would go to the personal representative. But it is very difficult to draw a sound distinction between rent which has fallen due, and a right of presentation which has attached during the life of the former prebendary, except upon the ground that the one is a right of a temporal nature, the other of a spiritual; and whether that be a sound distinction or not, I must leave upon the reasons and authorities which I have before given. The case of the donative, cited from 2 Wils. Rep., does indeed furnish some inference for a different opinion from that which I have formed; but I

* 603 must confess myself unable to * see the grounds upon which that judgment proceeded, in so short and unsatisfactory a report, with such a degree of clearness as to place it in competition with the other principles to which I have referred, and which lead my mind to a different conclusion. I have therefore felt myself bound, by the analogy to be drawn from cases decided as to lay advowsons, to adopt the opinion, that the right of presentation in this case belongs to the administratrix of the late prebendary. I must admit, at the same time, that it might be more fitting and expedient that it should devolve upon the successor; but I am not asked by your Lordships what is most expedient, but what the law at present is, upon the question submitted to us.

Judgment. Monday, August 19, 1833.

LORD LYNTHURST.—My Lords, I move for your Lordships' judgment in the case of *Mirehouse v. Rennell*. It was a case of a writ of error from the Court of King's Bench; that Court reversed a previous judgment on a *quare impedit* in the Court of Common Pleas. When the case came here, it was argued with great ability and learning in the presence of the Judges; they took time to consider the subject; there was ultimately a difference of opinion, six of them pronounced judgment in affirmance of the judgment of the Court of King's Bench, and two of them were of an opposite opinion. I have to move your Lordships, that the judgment of the Court of King's Bench be affirmed; not on the ground of the majority of the Judges being of opinion in favor of that judgment, but because I think it is a sound and correct opinion. It is not necessary on this occasion, after the many discussions the subject has undergone, and after the correct reports of the different proceedings in the various stages of the case, to enter into a detailed statement of these proceedings:

* I shall briefly state the grounds on which I shall move * 604 that the judgment of the Court of King's Bench be affirmed. The facts are shortly these: Mr. Rennell was a prebendary of Salisbury cathedral; to his prebend was annexed the rectory, or the advowson of the rectory, of the parish church of Welby, in Lincolnshire. The incumbent died during the lifetime of Mr. Rennell, and before Mr. Rennell had appointed a successor he himself died. The question is, whether the right of presenting to the vacant benefice belongs to the personal representative of Mr. Rennell, or to his successor in the prebend. This is the question for consideration. The advowson is the right of presenting to the benefice; it is an incorporeal right, and is subject to all the incidents of that species of property; it may be granted in tail, and demised for life or for a term of years. These different interests can be carved out of the fee. As long as the church was filled, the right of presentation was annexed to the advowson, and it passed with it into whose hands soever the advowson passed; the grant of the advowson carried the right to present. This continues so only as long as the

church is filled; if the church is vacant, in that case the right of presentation is a fruit fallen, a pure chattel; it is a *chose in action*, and severed from the advowson. The right of presentation, when so severed, passes like the arrears of rent, not to the heir (I am now considering the case of a natural person), but, according to all the authorities, to the personal representatives of the last owner of the advowson. If the advowson is granted for a term, and the benefice fall vacant, and the benefice is not filled up when the term expires, the lessee still has the right of presentation, on the ground of its being severed from the advowson. If a wife is

entitled to an advowson, and the benefice is vacant,
 * 605 and she dies before presentation, * the husband has the right to present, because it was severed from the advowson. I apprehend that there is no doubt respecting this principle which I have now stated. But it was argued at the bar and also in the Court below, on the authority of certain cases to which I will refer, that in reality there was no severance. The authorities cited on that point appeared to me to be mere exceptions to the general rule, or, if not, they tended to establish exceptions. There was one case, of a tenant *in capite* of the Crown, who held a manor to which an advowson was annexed: the incumbent died; the tenant of the manor died, his heir not of age; under these circumstances it was decided that the right to present did not pass to the personal representatives, but belonged to the Crown. It appears to me that this is an exception to the general rule, and is founded in the prerogative of the Crown; and the exception appeared from this, that if it had applied to a common person, the Court would not have decided so, but would have held that the right passed to the personal representative; and it also appeared, for another reason, that it was founded in the prerogative: in that case the heir, being an infant, might, when he came of age, sue out his livery, and if the King had not already presented, then he, and not the King, would, notwithstanding the circumstances, be entitled to present; which shows that the right was not severed from the advowson. In like manner, if the party entitled to the advowson, the benefice being vacant, granted the advowson, the right

of the next presentation did not pass, because of the severance from the advowson. There was cited another case; it was that of a bishop entitled to an advowson in right of his bishopric. The incumbent dies, and the bishop dies before presentation; the * Crown has the right to * 606 present, not the personal representative of the bishop.

That is another of those cases which are exceptions to the general rule, and are founded on the prerogative of the Crown. There was another case of this description: the incumbent died, the patron died during the vacancy of the benefice; and the question was, whether the personal representative of the patron had the next presentation, or the heir; which question was decided in favour of the heir, on the ground that the heir's title was superior. These are the cases which were relied on for the purpose of combatting the general position of law, that on the death of the incumbent, the right of filling the church was severed from the advowson; and the case is made out in respect of a natural person. The next question then is, how it applies to a sole corporation? I will first consider it disencumbered of its ecclesiastical character. A prebendary is a sole corporation. What is the difference between a sole corporation and a single natural person? I cannot distinguish the case of a sole corporation from that of a natural person. What would be the difference between them as to the right of succession? Respecting real estate, it would pass to the heir, or the successor; respecting personal estate (I consider it as an individual right), it would pass, as in the case of a natural person, to the personal representatives, executors or administrators. Arrears of rent, relief, and all fruits of this description, which are severed from the realty, become attached to the person, and pass to the personal representative as a chattel interest, and which cannot attach to the successor, and that was decided in Coke. If so, then this right to present becomes a chattel passed to the personal representative, and could not go to a successor. I consider the case as clear in point of * law, with * 607 reference to a sole corporation, as to a natural person.

The doctrine is the same as to a prebend. A prebend implied no cure of souls attached to it. It was unnecessary, before

the Statute of Uniformity, that a prebendary should be an ecclesiastic. Prebends were often granted to laymen, and there was no alteration made by the Statute of Uniformity, except that the office was to be filled by an ecclesiastic: it made no difference because it was so filled. It was not because it was held by an ecclesiastic that the presentation must devolve on his successor: in the case of an archbishop's option, it did not pass to the successor, but to the personal representative. The case of these options seems to me to furnish a strong analogy to the present case, and the same arguments that apply here against allowing ecclesiastical patronage to be vested in any but ecclesiastical hands, apply with equal force to the case of archbishop's options: yet upon the mode of their passing no doubt whatever is entertained.

It was said, in the course of the argument, that much inconvenience would arise from this decision, and that if carried into effect, the personal representative might be a female or a mere tradesman, who would thus have a right to present to a valuable and important living or benefice of this description. This must be the case, as the law exists at present; but your Lordships must not allow such considerations to influence your judgments: you must decide according to the law, even though the law is inconvenient. You must not suit your judgments to meet the opinions of what is convenient; the alteration, if any is necessary, must come from the legislature. On these grounds, and on this view of the case, I humbly submit that the judgment of the Court of King's Bench be affirmed.

* 608 *LORD WYNFORD.—I have had an interview with

Lord TENTERDEN on the subject of this case, since it came into this House, and that noble and learned Lord still continues of opinion that the judgment of the Court of Common Pleas was right. I confess that my opinion too is unchanged. If this were lay patronage, I should be ready to admit that the right of presentation was severed, that it was a fruit fallen, and ought to go to the executor or administrator. But in my opinion there is a wide distinction between ecclesiastical and lay patronage. These two rights of patron-

age are placed on perfectly different grounds; one being, as Lord KENYON has truly said, connected with an interest, while it is impossible to consider the other in the same view. There has been a point put in the Court below, which to me seems unanswerable. It is this, that in this case the lady is the administratrix of the lay property of her deceased husband, but not of the possessions of the church of Salisbury. The patronage now under discussion has no connection with the person of the individual himself, except so far as he stands in the character of a part of the church in whom the patronage was really vested. Lord COKE says, that where there was no common law, nor any statute nor custom against it, the ecclesiastical law would prevail. (a) Now, that was the case here, and this benefice fallen belongs to the church, and so *pertinet ad successorem*. I ask your Lordships whether it is proper that patronage of this sort should be liable to be disposed of for the benefit of creditors? In the present instance, I can say from my personal knowledge of the family, that it might have been safely left to the disposition of the administratrix; *but when your Lordships shall * 609 decide in her favour, that decision will govern other cases of a similar nature when the advowson may fall into bad hands, and the interests of the church may be made to suffer materially. Under these circumstances, I think it would be better if your Lordships could give the advowson to the successor; and if you do not consider yourselves bound to do otherwise, I think you should so give it. My noble and learned friend has alluded to the case of archbishops' options. I know that in some cases in the Courts of Equity, these options have been treated as property, and trusts relating to them have been recognized, but in all those cases it was taken for granted that archbishops' options were legal. We all know whence these options are said to have come, namely, from the Pope; but the first recorded instance of them that I can find, is in the reign of Henry 8th, at a time when the papal power in this country, both ordinary and extraordinary, had been overthrown. The first instance to be found in the books of the assignment to the archbishop of

(a) 1 Inst. 344 a.

a particular benefice, is in the case of Archbishop Cranmer. I have good reason, therefore, for doubting, whether they can be said to be established here by common law, and I hope sincerely that these options may soon be brought before this House, and that the law respecting them may be settled by Act of Parliament. I am bound, however, to say that Archbishop Cranmer, by the use he made of these options, almost justified the creation of them, for in every instance he handed them over to the successor. I shall not oppose the motion of my noble and learned friend, although I must say, that notwithstanding the great respect I entertain for the six

learned Judges who have delivered their opinions in
 * 610 favour of the claim of the * administratrix, I cannot help thinking, that able as they are, their opinions on this question are erroneous. I repeat, that I trust an Act of Parliament will soon set this matter right; and with that observation I shall consent to the judgment which has been moved by my noble and learned friend.

The judgment of the Court of King's Bench was accordingly affirmed.

* 611

* APPEAL

FROM THE COURT OF CHANCERY.

LOGAN AND OTHERS *v.* WIENHOLT AND ANOTHER.

1833.

SARAH LOGAN and Others *Appellants.*MARY WIENHOLT and Another : *Respondents.**Bond. Agreement. Specific Performance.*

A., in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned to give by will or otherwise, unto or in trust for her or the issue of the intended marriage, so much in

money or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whomsoever. *Held*, that this condition was not to be satisfied by the penalty,¹ but must be specifically performed.² All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life-interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate, for satisfaction of their claims under the bond.³

February, March, and July 7, 1832; April 4, 1833.

THE respondent, Mary Wienholt, filed her bill in the Court of Chancery, in the month of April, 1818, against the appellants and others, stating, amongst other things, that in the year 1772 a marriage was agreed on between John Wienholt, of St. Helen's, London, merchant, and Sarah Jopson, of Cannon Street, London, spinster, both since deceased; and that the said Sarah Jopson was the niece of Daniel Birkett the elder, also since deceased; and that, in consideration of the intended marriage, the said Daniel Birkett agreed to secure to her and the issue of the marriage, if Sarah Jopson or any issue of that marriage should survive him, the sum of 1000*l.*, in case he should leave a wife or any lawful issue; and in case he should die unmarried or without lawful issue, then the *sum of 2000*l.*, and such further share * 612 of his property as should be equal to the largest devise or bequest that he should make to his next of kin or any other person. And the said agreement was reduced into writing, and prepared in the form of a condition to a bond, and such bond was executed on the 8th April, 1772, and thereby the said Daniel Birkett bound himself, his heirs, executors, and administrators, in the penal sum of 4000*l.*, for

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1254, 1255; *Burrowes v. Gore*, 6 H. L. Cas. 907, 950.

² *Fry Specif. Perfm.* (2d Am. ed.) § 71, 139.

³ See *Squire v. Whitton*, 1 H. L. Cas. 342 note; *Burrowes v. Gore*, 6 H. L. Cas. 907, 950.

the due performance of the agreement contained in the condition of the said bond. That condition — after reciting the marriage agreed on, and that Daniel Birkett approved of the same, and in consideration thereof and of his natural love and affection for his niece, had determined to make provision for her and for the issue of the intended marriage — was declared to be, “that if the said intended marriage should take effect, and the said Sarah or any issue of the said intended marriage should survive the obligor, the heirs, executors, and administrators of the obligor should in that case, and also in case the obligor should happen to die unmarried and without any lawful issue, well and truly pay or cause to be paid unto Thomas Norman and John Greaves, their executors or administrators, the full sum of 2000*l.*, of lawful money of Great Britain, within the space of twelve calendar months next after the decease of him, the obligor; but in case the obligor should happen to depart this life, leaving a wife, or any lawful issue by him begotten, living at his decease, then the sum of 1000*l.* only; the said 2000*l.* or 1000*l.*, as the case might happen, to be paid to the said Thomas Norman and John Greaves, their executors or administrators, within twelve calendar months next after the decease of the obligor, to be by them, their executors or administrators, applied upon the trusts following (that

* 613 is *to say): that the said Thomas Norman and John

Greaves, or the survivor of them, or the executors or administrators of such survivor, should lay out the said sum of 2000*l.* or 1000*l.*, as the case should happen to be, in some of the public stocks or government securities, in trust for the said Sarah, and to permit and suffer the said Sarah or her assigns, notwithstanding her coverture, to receive and take to her own separate use, exclusive of her said intended husband, or any husband she might thereafter marry, the yearly interest, dividends, and proceeds thereof, from time to time during the term of her natural life; and from and after her decease, in trust for the issue of the said intended marriage, if any should be living at the decease of the said Sarah, equally to be divided between them, share and share alike, if more than one, at their respective ages of twenty-one years;

and if but one, then the whole to such only child, at his or her said age of twenty-one years, with benefit of survivorship in case any or either of such issue should happen to die under the said age; and the interest or dividends thereof to be paid and applied in and towards their respective maintenance and education" (with a power of appointment to the said Sarah over the said trust-fund, in case she survived the obligor and died without issue of the said marriage, or having issue, but such issue dying under the age of twenty-one; and in default of such appointment, the said trust-fund was to go to John Wienholt, the intended husband). "And also, if the said intended marriage should take effect, and the said Sarah, or any issue thereof, should happen to be living at the time of the death of the obligor, and the obligor should happen to die unmarried and without issue, he, the obligor, should, exclusive of the above-mentioned provisions, either * by his last will and testament give and bequeath, or * 614 by some other ways or means give or leave, unto or in trust for the said Sarah, or the issue of the said intended marriage, so much in money or in valuable effects as he should by such will give or bequeath to any one of his next of kin, or nearest relations, or to any other person or persons whomsoever, to be paid within twelve calendar months next after the decease of the obligor; or in case the said obligor should make no such bequest in such will to or in trust for the said Sarah, or the issue of the said intended marriage, or if such bequest should fall short of the greatest bequest in such will to any one of his, the obligor's next of kin, or any other person whomsoever, then if the executors or administrators of the obligor should within twelve calendar months next after the decease of him, the obligor, pay or deliver over to the said Thomas Norman and John Greaves, or the survivor of them, or the executors or administrators of such survivor, such bequest, or make good any deficiency that the same shall fall short of as aforesaid, in trust for the said Sarah and the issue of the said intended marriage, in manner as before mentioned respecting the said 2000*l.* or 1000*l.*, then the above-written obligation to be void and of none effect, otherwise to be and remain in full force and virtue."

The bill further stated, that shortly after the date of the said bond, the said marriage was duly had and solemnized ; and there were issue of the said marriage several children, of whom the plaintiff and J. B. Wienholt were the only survivors living at the death of the said Sarah their mother, and that had attained their respective ages of twenty-one, and

that the said Sarah and John Wienholt died in the life-
* 615 time of the obligor. The bill, after *describing the several interests possessed or represented by some of the parties, defendants thereto, further stated, that the obligor, after the date of the said bond, had a natural daughter (the appellant Sarah Logan), who in the year 1795 intermarried with Daniel Birkett the younger, nephew of the obligor, and that the obligor, through the influence of the said Daniel Birkett the younger, and his wife, became desirous of avoiding the effect of the said bond, and of depriving the said Sarah Wienholt and her family of the benefit to which they might be entitled under the same, or of diminishing such benefit ; and the obligor, and Daniel Birkett the younger, and the appellant Sarah his wife, at many different times took the advice of counsel as to the most effectual method of accomplishing this object, and consulted and employed several different solicitors for that purpose ; and that, in pursuance of the suggestions contained in the opinions so taken, or some of them, and with a view of defeating the operation of the bond, D. Birkett the elder invested large sums of money, in the whole above 100,000*l.*, in the purchase of real estates, for the purpose of withdrawing the property so invested from the effect of the said bond and agreement ; and that of such estates some were conveyed originally to himself for life, with remainder to Birkett the younger, and Sarah his wife, or one of them ; and others were originally conveyed to Birkett, the obligor in fee, and were afterwards settled by him to the use of himself for life, with remainder to Birkett the younger, and Sarah his wife, or one of them ; and that all such conveyances were made for the purpose of defeating the effect of the said bond.

And the bill further stated, that Daniel Birkett the elder was possessed of leasehold houses in different counties, that

he assigned the same at different times to various persons upon trusts for the benefit of himself * for life, * 616 and after his death in trust for Daniel Birkett his nephew, and Sarah his wife, or one of them, absolutely; and that such assignments were made solely or principally with the view of diminishing the amount of the personal property of which Birkett the elder should appear to be possessed at the time of his death; and that amongst several other conveyances and assignments of real and personal estate so made by Birkett the elder, was a voluntary settlement of certain freehold lands at Hadley, in the county of Hertford, and Enfield, in the county of Middlesex, in favour of the nephew and wife, reserving a life-interest to the settlor, and the reversion in fee in default of appointment. There was also by the same deed an assignment of an unexpired term of a house in Queen-square, subject to a rent of 18*l.* 10*s.*, upon the same trusts as were thereinbefore declared as to the said freehold estates; and by an indenture of the same date, and likewise without any consideration, certain freehold estates, situate in Cheddiston and Linsted, in the county of Suffolk, were conveyed to trustees for the nephew's family, with a life-interest reserved to the settlor. There was also a further voluntary settlement, dated on the 31st March, 1814, of certain other freehold estates in Asfield Thorp, St. Peter's, Westhall, Brampton, Chiddeston, Linsted Parva, and Metfield, in the county of Suffolk, in favour of the nephew's family, with a like reservation as in the former cases: and there was another voluntary settlement of the same kind, dated 31st March, 1814, with a like reservation in favour of the settlor.

The bill further stated, that Daniel Birkett the elder assigned securities for money, in favour of Daniel Birkett the nephew, and his wife, without consideration, and that amongst such assignments was one dated in March, 1811, of a bond for 16,000*l.*, to Daniel Birkett the nephew; that no notice of the assignment was * given to the obligors, and the * 617 assignor received the dividends to the time of his death; that the settlements were made on the understanding that Daniel Birkett the elder should, notwithstanding, have

the power of disposition over the property, and that the nephew and his wife should reconvey and reassign as he should appoint; that Daniel Birkett the elder transferred large sums of stock to Daniel Birkett the nephew, and Sarah his wife, on condition that he should receive the dividends during his life; that a deed to that effect was prepared; that he went into the city to make the transfer, but changed his mind; that afterwards he consented to make such transfer, on the importunity of Daniel Birkett the nephew, and his wife, and did transfer sums of 20,000*l.* navy five per cent annuities, and 37,000*l.* three per cent consols, into the names of Daniel Birkett the nephew, and wife, in order to evade the bond, and on condition that he should receive the dividends for life; that in the same manner he made an assignment of a mortgage for 2000*l.* for the benefit of Mrs. Birkett, but reserving a life-interest to himself; and that, by his will, dated 31st March, 1814, he gave to trustees as follows: "All my household goods, furniture, and fixtures, plate, linen, books, pictures, wearing apparel, watches, trinkets, china, glass, wines, liquors, provisions, and other effects, in and about or belonging to my dwelling-house in Hatton-garden aforesaid, and Hadley, in the county of Middlesex, and also my carriage, and every thing belonging thereto, in trust, for the sole and separate use of Sarah Birkett, the wife of my nephew, Daniel Birkett, and to assign and dispose of the same as she, notwithstanding her coverture, and as if she were a *feme sole*, shall direct or appoint; and I give to the

same trustees the sum of 2500*l.* sterling, upon the like
* 618 trusts, for the * separate use of the said Sarah Birkett.

I give to my said nephew, Daniel Birkett, the like sum of 2500*l.* for his own use. I give to my said trustees the sum of 20,000*l.* sterling, which I direct shall be laid out by my said trustees in the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities, to be varied from time to time as to my said trustees or trustee for the time being shall seem meet; and I declare that they shall stand possessed of the said sum of 20,000*l.*, and the stocks, funds, and securities in which the same shall be invested, and the interest, dividends, and annual produce

thereof, in trust for the four daughters of my said nephew, Daniel Birkett." He then made certain provisions with regard to the division of this money amongst the daughters of his nephew, and then proceeded in the following manner: "And I give to John Birkett Wienholt, and Mary Wienholt, the two children of my late niece, Sarah Wienholt, the sum of 6000*l.* sterling, to be equally divided between them; and I declare the same to be in full satisfaction of all claims under my bond bearing date on or about the 8th day of April, 1772; and in case they or either of them shall refuse, upon the request of my executor, to execute an effectual release of the said bond, then I revoke the last-mentioned bequest of 6000*l.*" The testator, after divers other bequests to servants and others, gave, devised and bequeathed all the residue and remainder of his estate and effects to his said nephew, Daniel Birkett, his heirs, executors, administrators, and assigns, for ever, to and for his and their own use and benefit absolutely, and appointed him sole executor of his said will.

The bill further stated that the obligor made a codicil to his will, making an alteration in one of his legacies, but without otherwise revoking or altering the * same, and * 619 died on the 8th of March, 1817, unmarried; and that Daniel Birkett the younger duly proved the said will and codicil, and by virtue of the probate thereof possessed himself of the personal estate of the testator to a very large amount, which, after payment of debts, &c., gave a clear surplus of personal estate to the amount of 20,000*l.* and upwards, independently of the personal property assigned and transferred by him in his lifetime as aforesaid; and the said testator's estates, including such property and the value of the real estates settled and conveyed as aforesaid, exceeded 200,000*l.*; and the respondents claimed by virtue of the bond, and in the events that happened, to have paid to them, out of the testator's personal estate, the sum of 2000*l.*, and also such further sum as would equal the largest amount of property given by the said testator's will, or by the said dispositions in his lifetime, to take effect in possession after

his death, whether the same were of real or personal property.

The bill then charged that the property which passed by the residuary clause in the said testator's will was very large, and was a legacy or bequest within the meaning of the agreement set forth in the said bond, and that the several gifts made by the testator in his lifetime to take effect in possession after his death, whether of real or personal property, were testamentary dispositions within the meaning of the said bond and agreement; and that the real estate was within the meaning and intention thereof, or if not, that the said personal property being invested in real estate for the purpose of taking it out of the effect of the said bond and agreement, such investment was a fraud upon the bond, and the said real estates ought either to be considered personal estate as against the parties claiming under the said bond and agreement, or as a security for the amount of the personality invested

* 620 in the purchase * thereof. And that the conveyances, settlements, transfers and assignments, were made without any consideration, as mere gifts, and the testator reserved a life-interest in all the property so conveyed and transferred, and also a power of disposition over the same, or if not, at least that he reserved a life-interest therein, and that the gifts were only reversionary, and not to take effect in possession and enjoyment till after the death of the said testator; and that all such conveyances, settlements, assignments, and transfers, were void as against the respondent Mary Wienholt, and all persons claiming under the said bond.

And the bill prayed that Mary Wienholt might be declared entitled to have the agreement contained in the condition of the said bond specifically performed, and that an account might be taken of the real and personal property of the said Daniel Birkett the elder, conveyed, settled, or transferred by him, without consideration, to or in trust for the said Daniel Birkett the younger, and Sarah his wife, or either of them, or their or either of their issue, or in any manner for their benefit, subject to any trust for, or power or interest reserved to, the said testator, either absolutely or for the term of his life, and that all such conveyances, settlements, and transfers

might be declared fraudulent as against the respondents, and subject to the agreement; and that an account might be taken of the general personal estate of the said testator, and of his debts, funeral and testamentary expenses and legacies, and that the same might be applied in a due course of administration, and that an account might be taken in like manner of all the said real and personal estates so conveyed, settled, and transferred as aforesaid, and the rents, profits, and produce thereof, and the proceeds of the sales thereof; and that the value of the property to which the respondent Mary Wienholt was entitled * under the said agreement, and * 621 the value of what she was entitled to under the said will, might be ascertained, and that she might be allowed to take the 6000*l.* bequeathed by the will, or the benefit secured by the bond, according as either should appear most beneficial for her.

D. Birkett the younger died before putting in an answer to the bill, and appointed his wife, Sarah (now Sarah Logan the appellant), and J. Quilter, executor and executrix of his will, and they proved the same, and put in a joint and several answer to the said bill, and therein admitted that the transfers of stock were voluntary, as well as the assignment of the bond debt, but denied that there was any trust in favor of testator in the stock or in the bond-debt, and also denied that the testator retained any interest therein, and insisted that the annuities and bond-debt ought not to be estimated as part of the testator's personal estate at the time of his death, but that the same must be considered as effectually given away and disposed of by the said testator in his lifetime, in manner aforesaid; and they denied that to their knowledge or belief any part or parts of the said testator's personal estate were or was assigned or transferred to the said Daniel Birkett the younger and defendant Sarah Birkett, or to either of them, subject to any trust in favor of the said testator.

The separate answer of the appellant Sarah Logan, put in afterwards to the amended bill, denied that the bond for 16,000*l.* was subject to the disposition of the testator, or that he had any interest therein; but admitted the testator

was to receive the interest during his life, and that Daniel Birkett the nephew executed a counter-bond for payment of such interest; and that appellant believed that obligors had notice of the assignment; and that it was the intention of the * parties that D. Birkett the elder should receive the dividends of the stock during his life.

And the appellant admitted it to be true, that some time before the transfer was made, the testator had agreed to make such transfer to her or her husband, or both, but she denied that to her knowledge and belief the same was done upon the importunity of herself or her husband; and she admitted that the said testator did agree to make and did make such transfer, for the purpose of diminishing the amount of his property which was to pass by his will, but she denied that it was to evade or defeat the agreement in the said bill mentioned; and she denied also that the said testator consented to make such transfers, or any of them, upon any written declaration of trust or agreement being made, or under any verbal promise by D. Birkett the younger, or the appellant, or either of them, that such stock should be retransferred to him the said testator, whenever he should call for the same, although she admitted it was understood and agreed that the dividends of such stocks or funds should be paid to him the said testator; that Daniel Birkett the elder intended to prevent the respondents taking any thing more than was bequeathed to them, and that he disposed of the bulk of his property in his lifetime, so as to prevent his will operating thereon.

The appellant admitted the assignments of leaseholds, and that they were made that the property might not be subject to his will; she admitted also the assignment of the bond debt of 16,000*l.*, and of a mortgage debt of 2000*l.*, and also a mortgage for 1523*l.* 17*s.* 2*d.* on St. Mary Hill estate, in the island of Tobago, which by his private cash-book he appeared to have given to his nephew in 1808; and that such assignments were made without valuable consideration. The appellant referred to entries in the private cash-book of * 623 Daniel Birkett the * elder, to show that these had been regularly entered, but admitted that, notwithstanding the transfer, Daniel Birkett the elder received the interest of

the bond-debt to the time of his death. She denied, however, that it was agreed the testator should have the power of disposing of the property settled or assigned, or that there was any secret trust as to that property, except as appears by the conveyances and assignments. She admitted the transfer of 20,000*l.* navy five per cents and 37,000*l.* three per cents into the names of Daniel Birkett the nephew, and Sarah his wife, and that such transfer was without valuable consideration; and that it was intended to pay the dividends to the testator for life, but that he died before the dividends became due; and that he reserved to himself no power of disposition over the stock, and did not mean the stock to be subject to his will.

The appellant, on her marriage with Mr. Logan, her second husband, conveyed and assigned all her real and personal estate to trustees, for her separate use; and these trustees and Mr. Logan were made parties to the suit, by supplemental bill.

The cause came on to be heard before the Lord Chancellor, who, by his decree dated on the 31st of May, 1825, declared, that the condition of the said bond contained an agreement which ought to be specifically executed by the Court, according to the true intent and meaning thereof, and that the parties intended to be benefited thereby were not bound to accept the penalty of the said bond, or the legacy given by the said testator's will, but were entitled in equity to have the full benefit of the provision agreed to be made in manner in the said condition mentioned; and his Lordship further declared, that the said testator having died unmarried and without lawful issue, the sum of 2000*l.* * ought to * 624 be paid out of his estate, according to the said agreement, for the benefit of the parties entitled thereto, with interest at four per cent, from one year after the testator's death: and that, exclusive of such provision, the testator ought to be considered as having engaged by will or otherwise to give or leave to or in trust for the parties meant to be entitled to the benefit of the said agreement, so much in money or in valuable effects as he should give or leave to any one of his next of kin, or any other person or persons, to be

paid within twelve calendar months next after his decease ; or if he should make no such bequest in his said will, or the same should fall short of the greatest bequest in such will, then that his executors or administrators should, for the benefit of such parties as aforesaid, pay or deliver over such bequest, or make good any deficiency that the same should so fall short. And his Lordship declared, that according to the true construction of the agreement contained in the said bond, the respondents electing to take under that agreement, and not to accept the 6000*l.* bequeathed by the will, were entitled to claim so much of the testator's property disposed by his will as would be equal in value to the largest amount of what was thereby bequeathed to any person or legatee, whether specific, pecuniary, or residuary legatee ; and did declare further, that the assignment of the 16,000*l.* bond debt, the 2000*l.* mortgage debt, the transfers of the said 37,000*l.* three per cent annuities, the 20,000*l.* navy five per cent annuities, and all other voluntary dispositions of personal property remaining personal at the testator's death, in which he reserved or retained a life-interest, or over the disposition of which he had a power of appointment or revocation, ought to be considered in equity, for the purpose of giving effect to

* 625 the true intent and meaning of the said agreement, * as having the same effect as if the said sums of 16,000*l.*, 2000*l.*, 37,000*l.*, 20,000*l.*, and such other personal properties so voluntarily disposed of, had been bequeathed by the testator's will to the persons after his death respectively entitled thereto. And it was ordered that it be referred to the Master to inquire whether the testator in his lifetime made any and what other voluntary dispositions, as to his personal estate, which would fall within the declaration as to voluntary dispositions ; and that the then defendants should transfer the said sums of stock, respectively standing in their names, into the name of the accountant-general in trust in the cause, and pay the dividends thereon, until such transfer, into the bank : and that the Master should inquire into the circumstances of the transfers by the testator. And it was ordered that the said Master should inquire what purchases were made by the testator of real property, after the execution of

the said bond, of which the conveyances or assurances were originally taken either to himself or in trust for himself in fee, and as to which, by subsequent acts, assurances, or conveyances, and of what dates, he afterwards reduced himself to be tenant for life in law or equity, and with remainder or remainders to other person or persons, and to whom, and also what purchases of real property were made by the testator after the execution of the said bond, taking the conveyances or assurances to or in trust for himself for life, with remainder or remainders over, and to whom. And it was ordered that an account should be taken of the personal estate of the said testator that had come into the hands of the present appellants, or any person or persons by their or any of their order or for their use, including what might have been received under the voluntary dispositions of *personal * 626 estate, as to which the respondents were thereby declared to be entitled to be relieved.

The Master having made his report, the case came on to be heard on exceptions to that report, and for further directions, before the Vice-Chancellor, on the 7th day of March, 1829; who, by a decree then made, declared that the exceptions against the said Master's report be overruled, and that the several voluntary dispositions of personal estate made by the testator were to be considered in equity, for the purpose of giving effect to the agreement contained in the condition of the bond, as having the same effect as if the personal estate so voluntarily disposed of had been bequeathed by the testator's will to the persons who, after his death, were intended to take the benefit of such dispositions. And it was declared, that, according to the true construction of the said agreement, all testamentary dispositions of freehold, and copyhold, and leasehold estates and dispositions of that nature, which by the decree in the cause were declared to be of the nature of testamentary dispositions, were within the intent and meaning of the said agreement. And that all the several freehold and copyhold estates purchased by the said testator after the execution of the said bond, were to be considered in equity, for the purpose of giving effect to the true intent and meaning of the said agreement, as if the said real

estates had been given or devised by the said testator's will. And it appearing that Daniel Birkett the younger was the person to whom, by such testamentary dispositions as aforesaid, or dispositions in the nature of testamentary dispositions, the largest benefit was given, it was referred to the Master to compute what, at the time of the testator's death, would

have been the amount and value of the benefits which

* 627 * the said Daniel Birkett the younger would have taken under such several dispositions as aforesaid, according to the declarations contained in the said decree made on the hearing and in that order, if the said bond had not been made; and it was declared that the respondents were entitled to stand as specialty creditors upon the estate of the said testator, for a sum equal to such amount and value, with interest thereon at 4l. per cent., from the end of a year from the death of the testator. And it was further declared that, as between the parties taking the freehold and personal estate of the testator, the general personal estate should be first applied, then the personal estate specifically bequeathed or disposed of, and lastly, the freehold estates, in satisfaction of the demand of the plaintiff and the defendant John Birkett Wienholt (the present respondents). And it was referred to the said Master to take the subsequent accounts of the personal estate of Daniel Birkett the elder, received by the appellants, including what might have been received under the voluntary dispositions of personal estate, as to which the respondents are thereby and by the decree in that cause declared entitled to be relieved. And that in case the funds in court, and other property applicable thereto under that decree, should not be sufficient to answer what should be found to have been received by Daniel Birkett the younger, it was ordered that the deficiency be answered by Sarah Logan his executrix, out of his estate and effects. And the Master was directed to inquire who, since the date of the decree, had been entitled to receive the rents, dividends, and interest of the separate estate of Sarah Logan, and to whom the same had been respectively paid; and in case he should find Sarah Logan to have been in the receipt and enjoyment of the said rents, dividends, and interest, he was to

inquire * whether her receipt thereof respectively was * 628 or not with the permission of her trustees, and to state the particulars of the said separate estate, and what had become thereof, and to state special circumstances.

The appellants appealed against both the decrees, and the case was several times argued by *Sir C. Wetherell* and *Mr. Pepys*, for the appellants, and by *Sir E. Sugden* and *Sir W. Horne*, for the respondents.

For the appellants, it was contended that the question was whether the agreement must be taken to affect the whole of the testator's property, or whether its operation was to be limited by the amount of the penalty; whether it was to be executed specifically, or might be cut down to the penalty stated in the bond. The obligation was not, that the "heirs, executors, and administrators" of the obligor should pay the increased provision, but that only the executors and administrators were bound to do so. That difference was important, as it showed that it was not the intention of the testator to put that portion of the provision for his niece on the same footing with the other. Another question was, whether the testator only meant a gift *inter vivos*, or whether he intended to take away from himself any possible discretion to dispose of his property as he pleased during his life. This latter construction of the agreement must be considered as one *strictissimi juris*, and therefore could not be viewed with favour by their Lordships. They who argued for such a construction, must go to the extent of saying, that if he converted any part of his personal property into land, that land would not go to his heir-at-law, and that every estate coming from another person to him must also be brought under the operation of this instrument; so that in all cases whatever the realty must be converted into personalty, in order to be disposed of by this clause.

[The * EARL OF ELDON. — It was left to the Master * 629 to examine whether the real estate had not been purchased in fraud of the agreement. The evidence given before the Master showed that in this case purchases had been made in fraud of the agreement, and the principle on which the case

turned was, that the testator could not be allowed to commit a fraud upon his own agreement. If a man agreed to leave all his children equally, and during his life gave to one of them a sum of money, that would be a gift in charity; but if he only gave the money, reserving to himself a life-interest, that would not be a gift within the meaning of the covenant.]

The Vice-Chancellor's decree assumed that these conveyances of land and stock were fraudulent. That was wrong. But assuming it to be right, the decree gave more than an equivalent to the other party. The decree had improperly ordered the then plaintiffs to be "specialty creditors on the estate of the testator;" a direction that ought not in this case to have been given. In *Chilliner v. Chilliner*, (a) it was stated by Lord HARDWICKE, that in all cases of this kind every thing must depend on the nature of the consideration of the original agreement. Now, here the testator had only said that he would make the parties equal, or that he would pay a sum of 4000*l*. If he only gave each individual 4000*l*., it would save the agreement. In all other cases the agreement was made part of the condition of the bond, and it should be so considered here. It was, in fact, recited before coming to the condition of the bond.

For the respondents, it was argued that the case of *Chilliner v. Chilliner* was not opposed to the present. That case was before Lord HARDWICKE, and the argument there * 630 proceeded much upon the question, whether *if the agreement was not stated in the recital, it was good for any thing. That case, however, decided that where a father had agreed to settle property on a marriage, and then gave a bond for 600*l*., with 1200*l*.-penalty if he did not make the settlement, he had not afterwards the election to forfeit the 600*l*. or to settle; the settlement being treated as the primary agreement, and the 600*l*. as only a penalty or further security. The consideration here was, "if the intended marriage shall take effect." The condition, pointing out what was to be done, operated in the same way as an agreement to do the thing thus designated. This case was, there-

(a) 2 Ves. Sen. 528.

fore, precisely the same as that of *Chilliner v. Chilliner*. Lord ELDON had properly held that the amount of the penalty was not a matter to be considered, for that the act agreed upon must be done specifically. The answer of the defendants admitted the transfer of the property, by means of which the testator had tried to render it impossible for him to perform the agreement he had made. The facts were now settled, but they had not been so when the case was before the Court below. When the case was before Lord ELDON, he declined expressing any opinion as to the effect of the bond on the realty as well as the personalty, though he intimated that he was inclined to think it did relate to both. The agreement in substance amounted to this, that the testator should give his niece as much in money as he gave in any other way to any other person. The case of *Jones v. Martin*, (a) was an authority in favour of the respondents. In that case there was a covenant by a father to give, or leave by his will, all his personal estate equally among his children. It was held that that covenant *did not deprive him of the * 631 right of unlimited expense, and of any fair application, even by gift, if absolute and *bonâ fide*; but that a disposition for the purpose of defeating the covenant could not stand. Transfers of stock to one of the children by the father, were, therefore, upon the circumstance of a reservation of the dividends for his life, and other evidence of a partial intention to elude the covenant, set aside. In that case the Lord Chancellor said, "If a father be partial, and will give a preference, he must give against himself, and not make a mere reversionary gift." The principal case to which that of *Jones v. Martin* was appended as a note, was *Randall v. Willis*, (b) where there were articles entered into for the settlement of certain real estates, and then came the words, "and also all and singular my personal estate of what nature or kind soever." In that case the decree was, that upon the true construction of the articles, the personal estate of which Randall was possessed at the time of the execution of the

(a) 3 Anstr. 882; more fully reported in 5 Ves. Jr. 266 n. See also *West v. Errissey*, 2 P. Wms. 349.

(b) 5 Ves. Jr. 262.

articles, and which had since been laid out in land, in fraud of those articles, ought to be subject to the provision made by the said articles, and settled according to the agreement therein contained. That case established, that when real estate was improperly acquired by money that was already subject to the stipulations of an agreement, it should be treated as personal estate, for the purpose of avoiding the fraud upon that agreement.

In reply, it was contended, that if the doctrine contended for by the respondents was admitted, a person could not vest personalty in land without its being liable to a bond-creditor.

Lands purchased as these had been, were withdrawn * 632 from the operation of the * agreement; and it would be absurd to carry the doctrine contended for by the respondents so far as they now desired, for that would be to make an agreement contained in a bond entered into with a penalty of 4000*l.*, affect the disposition of property that might amount to 100,000*l.* This never could have been the intention of the parties, nor would the law permit such a consequence.

July 27, 1832.

The Earl of Eldon said that he saw no reason to change the opinion he had formed in the Court below.

THE LORD CHANCELLOR. — In the course of the argument, it had been the opinion of all the Lords who had heard the case, that great difficulties had been pressed upon their consideration. It had been thought that the condition of the bond must be taken to operate *in limine*. That was the foundation of the decree of Lord ELDON, and they felt that they could have no difficulty in concurring with that view of the matter. The difficulty had arisen upon what had been since done, namely, in the decree of the Vice-Chancellor; and as that difficulty which had been raised in the discussion had not been removed, he should propose taking further time for consideration. But without stating that he possessed any distinct opinion on those important points to which the decree of the Vice-Chancellor had given rise, he could not avoid

expressing the strong inclination of his opinion on one or two of the matters on which the Vice-Chancellor had decreed. He should say nothing with respect to the 57,000*l.* that had been transferred, which the Vice-Chancellor dealt with as if transferred to Daniel Birkett the younger: on that he had some doubt. But that on which he had less doubt, and where his opinion was opposed to that of the Vice-Chancellor, * was that part of the decree where his * 633 Honor had said that all the testamentary dispositions of leasehold, freehold, and copyhold estates, were within the intent and meaning of the agreement. He was not prepared to say that that was the true construction of the agreement; he should rather say that it was confined to personalty. But that on which he had a very strong impression was, as to the mode of calculation adopted with regard to the bequests. The result of his Honor's decree on that point was, that it was the plain and obvious meaning of the parties to this agreement that, whatever the most favoured person received in personalty or realty, as much should be given to Sarah Jopson; so that whatever was given to Daniel Birkett would be suddenly taken away from him, and given to Sarah Jopson, who, getting this in addition to what she before had, would therefore take nearly the whole. He was not prepared to put a construction on the agreement that would produce such a result. The parties ought to agree among themselves as to the division of this property; but as they would not agree, they ought to give in schemes of what each asked to obtain from their Lordships.

Lord PLUNKETT entirely concurred with the Lord Chancellor on the points now referred to. There was not any difference of opinion or any doubt as to the propriety of the decree first made in this case. What Lord ELDON had decided had been most properly decided; but his decree necessarily left a great many most important points untouched. The first of these points was, whether the contract related to more than personal estate. On that point he should wish for further time to consider the case and refer to the authorities.

The second point was, if the House would go the
 * 634 length of * saying that the contract related merely to
 the personalty, and not to the real estate, and if so,
 then whether the party had a right to vest his personal
 estate in the purchase of real estate; a question, indeed,
 whether their Lordships would follow the motive of the party
 in transferring his property from personalty to realty, and
 would say that it was done for the purpose of increasing one
 fund and diminishing another, and if so, whether in their
 opinion it was done with a view fraudulently to defeat the
 agreement. Then came the important questions as to the
 transfer of the 37,000*l.* stock; as to the mode of ascertaining
 the amount; then, in what way the fund should be dis-
 tributed, and how to give effect to the contract. It was
 impossible to say on this contract, though no doubt a great
 benefit was intended to be given to Sarah Jopson, no greater
 benefit indeed to any person than to her; still, it was impos-
 sible to say that it was intended she should get all; at least
 so he thought at present. But if that should in the end be
 considered to be the effect of the contract, their Lordships
 must see it carried into execution.

The Earl of Eldon desired that counsel on both sides
 should draw up the minutes of what they claimed respect-
 ively, in such way as they thought proper.

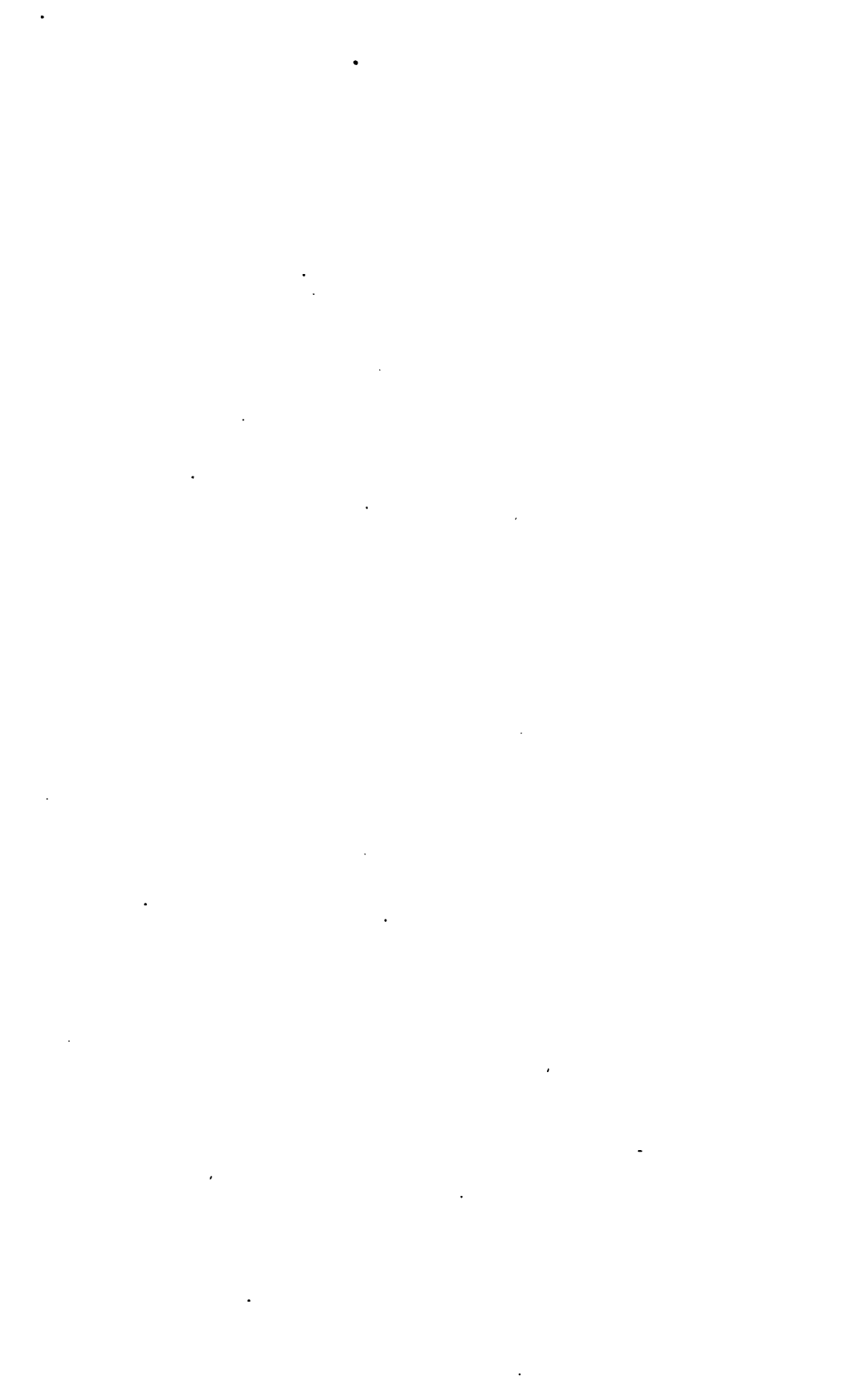
April 4, 1833.

Their Lordships, by an order bearing date on the 4th of
 April, 1833, and reciting the substance of the two decrees
 of Lord ELDON and of the Vice-Chancellor, confirmed them
 both.

That part of his Honor's decree which had been doubted,
 namely, that relating to the liability of the after-purchased
 real estate to the claims of the obligees in the bond, was
 referred to in the following terms: "And their Lord-
 * 635 ships further found and declared, * that all the real
 estates referred to as having been purchased after the
 5th of April, 1804, and in which purchases, or by any sub-
 sequent conveyance, Daniel Birkett the elder retained any
 interest for his life of in fee, and gave any interest to Daniel

Birkett the younger, ought, for the purpose of the said agreement, to be considered as personal estate, and as if made the subject of testamentary disposition to Daniel Birkett the younger, and to be dealt with as part of the residue, in so far as Daniel Birkett the younger's interest was concerned." Their Lordships' order further declared, that "the demand of the respondents was a debt by specialty, and as such entitled to priority over both the simple-contract debts and the legacies, whether residuary or otherwise, and that the whole of the property disposed of by the will, under the description of residue, was applicable to discharge such debt to the respondents; and if that fund should not be sufficient, then that the shares of Daniel Birkett the younger and his wife were liable, for satisfaction of this claim, to abate in proportion to the amount of the benefits taken by them under the will, or by gifts in which Daniel Birkett the elder retained any interest during his life."

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INDEX.

ADVOWSON. See **PRESENTATION.**

AGREEMENT. See **BOND, 3. MASTER AND SERVANT. PROPERTY.**

BANKRUPT. See **PRACTICE, 9.**

A. contracted a debt, and afterwards became a trader; the debt remained unpaid; he went out of trade, and then committed an act of bankruptcy. *Held*, that a commission of bankruptcy could be maintained upon such debt and act of bankruptcy. — *Baillie v. Grant*, 238.

BOND. See **PLEADING, 1.**

1. No action can be maintained on a bond given to a person in consideration of his doing something contrary to the terms of letters-patent; and he is equally incapable of recovering, whether he knew or did not know the terms of the letters-patent. — *Duvergier v. Fellowes*, 39.
2. Two ladies entrusted much of the management of their affairs to A., who was not a professional person. In the course of business A. became bound with them in a bond for 10,000*l.*, given on their account. On the same day, they executed a bond to A. for 12,000*l.* The survivor of the two ladies afterwards, by her will, left a legacy of 2000*l.* to A. The bond for 12,000*l.* was, on the face of it, a simple money bond. *Held*, that it must be taken to be a simple money bond, unless impeached by evidence which showed that it was partly for indemnity; and that the burden of proving it to be an indemnity bond lay on the party impeaching the bond. — *Nicol v. Vaughan*, 49.
3. A., in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned to give by will or otherwise, unto or in trust for her, or the issue of the intended marriage, so much in money, or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whomsoever. **Held*, that *638 this condition was not to be satisfied by the penalty, but must be specifically performed. All voluntary assignments and transfers of personal property, and all conveyances of real estate, purchased subsequently to the date of the bond, in which real

estate or personal property the obligor retained a life-interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said real estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate, for satisfaction of their claims under the bond. — *Logan v. Wienholt*, 611.

CHARTER-PARTY.

Where the owner of a ship appointed G. B. to the command, and agreed that he should proceed to Calcutta and return to London, and that he might take intermediate voyages, paying a certain sum in consideration thereof; and the owner further agreed to supply the ship with stores, in consideration of which G. B. agreed to take the command, and receive the ship into his service, for twelve months certain, or for such time as would be necessary to complete the voyages, paying at a certain rate per ton per month for the ship. *Held*, that although G. B. was further bound by the agreement to remit the freight bills to London as security, and that such bills were to be vested in trustees who were to receive the freight, and hand over the surplus to him, and although the owner was to have an agent on board, who was to have the sole management of the stores, and to have power to displace G. B. for breach of any covenant in the charter-party, and appoint another commander, G. B. was the owner of the vessel during the continuance of the charter-party, and was as such alone liable to persons who, knowing its provisions, had shipped goods on board the vessel for the homeward voyage. — *Colven and others v. Newberry and another*, 288.

CHURCH. See PRESENTATION.

COMPOSITION DEED.

A., a creditor of a firm, held securities from one of its members for moneys advanced by him, at different times, to the firm, but claimed a balance beyond what those securities would cover. All
 * 639 the creditors of the firm agreed to accept * a composition "of 7s. for every 20s. due to the said creditors respectively." A. was the first to sign this deed; but added to his signature the words, "without prejudice to any securities whatever that I hold." The other creditors signed, in their respective order, under A.'s signature. *Held*, that such a composition, thus accepted, did not affect the rights of A. upon his previous securities, but only related to the balance beyond the sum they would cover; and that he might afterwards enforce those securities in equity. — *Duffy v. Orr*, 253.

CROSS-BILL. See PRACTICE, 8.

CUSTOM. See TITHES.

DEVISE. See **ELECTION.**

1. A limitation, by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years, as a term in gross and without reference to the infancy of any person, is a valid limitation. *Secus*, if to the term in gross of twenty-one years be added the number of months equal to the longest or ordinary period of gestation.

This being held to be the established rule, a decree of the Court below, declaring valid a limitation by way of executory devise, which was not to vest until after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons, who were living at the testator's decease, and of whom seven persons only were to take interests under the devise, was affirmed accordingly. — *Cadell v. Palmer*, 372.

2. Where there is a clear and manifest intention to devise, it is incumbent on a party alleging a revocation by codicil to prove that the intention to revoke was equally clear and manifest; if there was only a reasonable doubt, the first devise ought to stand.

A testator devised his copyhold messuage, called Plomer Hill House, with the appurtenances, to trustees, in trust for his wife for life, and subsequently, by one of several codicils, revoking several of the dispositions made by his said will of all his freehold, copyhold, and personal estate, he, instead of such disposition, devised all his freehold, copyhold, and personal estate, to his daughter. *Held*, that the devise of the estate to his wife for life was not affected by this codicil. — *Hearle v. Hicks*, 20.

* **ELECTION.**

* 640

In order to raise a case of election on a testamentary instrument, the intention of the testator must clearly impose an obligation to elect; and in order to hold a party to have made election, his acts must be conformable to the instrument imposing the obligation to elect, and not adverse thereto.

Where parties may elect between two titles, either as tenants for life or tenants in fee-simple, and continue in possession for near forty-four years, executing in the mean time various deeds, reciting that they took under the former title: *held*, that they have elected to take under that title, and their heir-at-law is precluded from claiming the fee under the latter. — *Dillon v. Parker*, 303.

EVIDENCE. See **TITHES.** **WITNESS.**

EXECUTION. See **EXTENT (WRIT OF).** **PLEADING, 2.**

EXTENT (WRIT OF).

Where goods have been seized under a *fi. fa.*, but remain unsold in the hands of the sheriff, he shall sell them under a writ of extent in chief or in aid, tested after the seizure under the *fi. fa.*, and shall satisfy the Crown's debt without regard to the previous execution. — *Giles v. Grover*, 72.

FOREIGN SOVEREIGN. See PRACTICE, 8.

FREIGHTER. See CHARTER-PARTY.

INSOLVENT. See COMPOSITION DEED.

LIMITATION. See DEVISE.

MASTER AND SERVANT. ?

A master having admitted that, by his factor's agreement, he promised to his servant, in addition to his ordinary wages, a present of 20*l.*, the service to be at all events till the end of one year; and that sum not having been paid at the expiration of the year, and the service having continued for several years: *held*, that the contract was renewed in all its parts from year to year; and, nothing being said to the contrary by either party, that 20*l.* was due for every year of the service. — *Earl Mansfield v. Scott*, 319.

PERPETUITY. See DEVISE.

* 641 * PLEADING. See PRACTICE.

1. The illegality of the condition of a bond may be shown by the plaintiff in stating the bond itself, with the condition, in his declaration; or, if he omit to state the condition, it may be shown by the defendant in his plea, and the Court will equally take notice of the illegality in either case. — *Duvergier v. Fel-lows*, 39.
2. In an action of trespass, where the defendants justify under a *fi. fa.*, and the plaintiff replies *de injuria absque residuo causæ*, and new assigns, that the defendants committed the trespasses on other occasions, and for other purposes than in the plea mentioned, the Judge may leave it to the jury to say whether the execution was *bonâ fide* or colourable. — *Lucas v. Nockells*, 438.
3. Where a canal Act gave to the proprietor of the navigation a power of making a canal, and of using the waters of a river for supplying it, but provided, at the same time, for securing to the owners of certain works the use of the surplus waters of that river, the making of the canal ascertained and fixed the rights of the parties, and the canal proprietors had no right afterwards to enlarge the canal, and draw a much larger quantity of water from the river, so as injuriously to affect the works in question. A declaration, charging it to have been the duty of the canal proprietors to abstain from thus enlarging their canal, and alleging a breach of that duty, sets forth a sufficient cause of action against them. — *Glamorganshire Canal Company v. Blake-more*, 262.
4. A clause in a second Act of Parliament relating to the same canal declared that the works thereby authorized should be completed within two years from the time of its passing, and that the money to be raised by it should not be applied to defray the ex-

penses of any of the works not made within that time. *Held*, that this clause not only limited the application of the money to works completed within that time, but that no works should be carried on, adversely to the interest of individuals, after the expiration of the two years. A declaration framed on such a clause, and alleging for breach that works were so adversely carried on after the expiration of the two years, was held to contain a sufficient legal statement of a cause of action. — *Ibid*.

* POWER (EXECUTION OF).

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A testator, by his will, devised his land to trustees, with a power of sale. The trustees sold the estate, but as it was supposed that the tenant for life, without impeachment of waste, was entitled to the produce of the growing timber, the deed for carrying the contract of sale into effect recited that the trustees had sold the lands for a certain sum, and that the tenant for life had sold the timber then standing thereon for a certain other sum. The purchase-money of the estate was paid to the trustees, and invested according to the directions in the will; the value of the timber was paid to the tenant for life. *Held*, that this was a bad execution of the power, and that it was not cured by the subsequent investment by the tenant for life, according to the directions in the will, of the money which, under a mistake of the law, had been thus paid over to him. — *Cockerell and others v. Cholmeley*, 60.

PRACTICE.

1. If the appellant does not appear to support his appeal, the respondent's counsel are not compellable to go on, but the appeal may be dismissed, and the House will afterwards exercise their discretion as to the costs. — *Gardiner v. Simmons*, 35.
2. *Semble*.—If two Courts have been of the same opinion on any point, and their judgments are appealed from and affirmed, the House of Lords will give costs on the affirmance. — *Duvergier v. Fellows*, 39.
3. This House will not postpone the hearing and decision of any appeal on account of the absence of counsel, but will call on the counsel on either side in attendance to proceed with the argument. — *Mellish v. Richardson*, 224.
4. A Court of Law has authority over its own record, which it may amend, even after error brought. — *Ibid*.
5. A Court of Error will not inquire into the propriety of amendments made in the Court below, but, though such amendments be made after error brought, will consider them as part of the original record subjected to their revision. — *Ibid*.
6. *Semble*.—The House of Lords will, under peculiar circumstances, hear two counsel for a respondent, although to hear but one on each side may be part of the order made on *ad- *643 vancing the appeal, on the petition of the appellant. — *Dillon v. Parker*, 303.

7. *Simble*, also, that although it is usual, according to the orders of the House, to insert in the printed cases all the documents that are to be relied on, except the parties, to save expense, come to an understanding to refer only to some; yet the House will hear the documents so referred to read at length at the table of the House or by counsel at the bar; the opposite counsel being at liberty to examine and observe upon them. — *Ibid*, 304.

8. A foreign sovereign prince, being declared entitled to sue in the Court of Chancery here in his political capacity, claims the privilege of putting in an answer, by his agent, or without oath or signature, to a cross-bill, filed against him by the defendants to his original bill. *Held*, that he stands on the same footing with ordinary suitors as to the rules and practice of the Court, and is bound, like them, to answer a cross-bill personally and upon oath.

The plaintiffs in the cross-bill having put in a full and sufficient answer to the original bill, which is subsequently amended, obtain an order for a month's time to plead, answer, or demur to the amended bill after the plaintiff therein should have answered their cross-bill. That order is held good, and is accordingly affirmed. — *King of Spain v. Hullet*, 833.

9. A bankrupt is made defender to an action with the trustee under the sequestration, and a decree is pronounced against him in his absence. He is afterwards allowed to come in without the trustee and lodge defences to the action; after which the pursuers apply for and obtain from the Court an order, that he gives security for the expenses of process before he shall be further heard. *Held*, that the order, in that advanced stage of the proceedings, is not well founded, and is accordingly reversed. — *Taylor v. Fairlie*, 355.

10. In a suit for the administration of assets of obligors in a common money bond, the Master, under an order of reference made by consent, enabling him to inquire into the consideration and all the circumstances relative to the bond, reported that it was a voluntary bond, given as a bounty to the obligee. The representatives of the obligor and obligee took exceptions to the report; the former alleging that it was a bond of indemnity, the latter claiming it partly for money advanced * and partly for services performed. The Court below refused leave to withdraw the obligee's exceptions, and directed issues to try whether the bond was given for money and services, or as a gift, or for indemnity. This House, on appeal, reversed that order, and remitted the case to the Court below to decide these questions on the evidence before it. The Court below decided accordingly upon a new hearing, and declared the bond to be partly for counter-security, partly as gift for services. This House, upon appeal, reversed that decision also, and ordered the Master's report to be confirmed. The Court below subsequently, upon

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the hearing of counter-petitions (one presented by the representative of the obligee, praying payment of the bond and interest; the other by the representative of the obligors, praying for leave to institute a new suit, to impeach the bond, on the ground that a gift from a principal to an agent was invalid in equity), decreed for such suit, and granted an injunction against any proceedings on the bond in the mean time. This House, upon appeal, reversed that decree, holding, that as the respondent omitted to take advantage of any of the opportunities of raising that objection to the bond in the preceding inquiries, it was not now competent for him to harass the other party by a new suit in which no new evidence could be produced. — *Nicol v. Vaughan*, 495.

PRESENTATION.

Where an advowson attached to a prebend falls vacant, and before filling it up the prebendary dies, the presentation belongs to the administratrix, and not to the successor. — *Mirehouse v. Rennell*, 527.

PROPERTY (RIGHT OF).

While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely and adversely in another. — *Clerk and others v. Adams and others*, 242.

The terms in which a man puts a request are not to be considered as conditions binding on him and his issue to all time to use the subject-matter of that request in a certain manner and in no other. — *Ibid.*

SECURITIES. See COMPOSITION DEED.

SHIP. See CHARTER-PARTY.

SPECIFIC PERFORMANCE. See BOND, 3.

* STATUTES (CONSTRUCTION OF). See PLEADING, 3. * 645

1. Where a canal Act gave to the proprietors of the navigation a power of making a canal, and of using the waters of a river for supplying it, but provided at the same time for securing to the owners of certain works the use of the surplus waters of that river, the making of the canal ascertained and fixed the rights of the parties, and the canal proprietors had no right afterwards to enlarge the canal and draw a much larger quantity of water from the river, so as injuriously to affect the works in question. — *Glamorganshire Canal Navigation Company v. Blake-more*, 262.
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completed within that time, but that no works should be carried on adversely to the interest of individuals after the expiration of the two years. — *Ibid.*

TITHES.

A custom to pay one-twentieth instead of the full amount of tithes, though proved to be very ancient, cannot be supported by such proof alone, but must be shown to have had a legal origin. In a case where this proof of legal origin was wanting, the House of Lords, affirming a decree of the Equity Exchequer, *held* the tenants of the lands liable to account for the full tithes. — *Wilson v. Lord Kensington*, 1.

TRADING. See *BANKRUPT*.

TRESPASS. See *PLEADING*, 2.

WILL. See *BOND*, 3. *DEVISE*. *POWER*.

WITNESS.

A witness cannot be rejected unless he has a direct and immediate interest in the result of the case in which he is called to give evidence, nor unless the verdict in that case can be given in evidence for him in another suit.

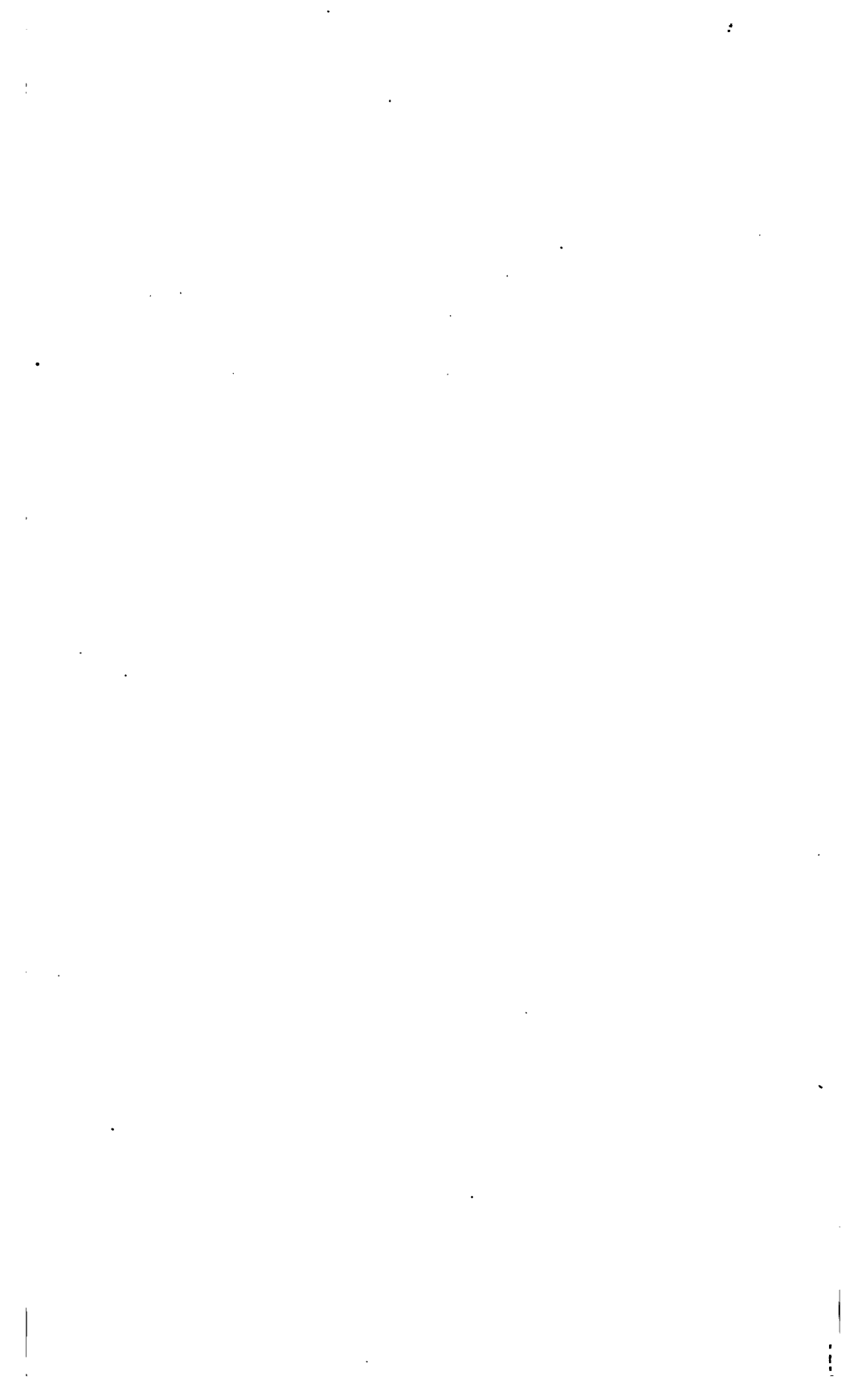
The rules of law in England and Scotland are the same on this subject. — *Ralston v. Rowat*, 424.

But see the Act 3 & 4 Will. 4, c. 42, § 26, passed since this case was decided.

The importance of the case of *Giles v. Grover*, and the opposing opinions held upon it have induced the reporters to give almost at full length all the judgments delivered in it. The few parts that are abridged, are those in which any one of the learned Judges restated the particulars of cases already quoted. In the next number the report of this case will be concluded, and accompanying it will be found all the cases decided at the close of the last session of Parliament, and deemed worthy of being reported.

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END OF THE FIRST VOLUME.





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